No. 2325

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE FEDERAL MINING & SMELTING COMPANY, a Corporation,

Plaintiff in Error,

vs.

C. H. HODGE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

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[Names and Addresses of Attorneys.]

Messrs. FEATHERSTONE & FOX, Residence, Wallace, Idaho,

Attorneys for Plaintiff in Error.

Messrs. ROBERTSON & MILLER, Residence, Spokane, Washington,

WALTER F. MORRISON, Jr., Residence, Coeur d'Alene, Idaho,

Attorneys for Defendant in Error.

In the District Court of the United States for the Eastern District of Idaho, Northern Division.

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of the defendant and for cause of action alleges:

I.

That at all the times hereinafter mentioned the defendant was and now is a corporation created, organized and existing under and by virtue of the laws of the State of New Jersey, and is a citizen of said State, and has complied with the laws of the State of Idaho relative to foreign corporations doing busi-

ness therein, and owns and operates the Last Chance Mine, a silver and lead quartz mine at the town of Wardner, Shoshone County, Idaho, and that the plaintiff was at all of the times herein mentioned and now is a citizen and resident of the State of Idaho.

II.

That on the 17th day of May, A. D. 1912, and for more than one month prior thereto, the plaintiff was and had been in the employ of the defendant as a mucker, on the fourth level of the Last Chance Mine about 450 feet from the "D" hoist, which is about 480 feet above the Sweeney level, and that in order to reach the workings in said mine where the defendant was engaged he was required to ride from [1*] the Sweeney level to the said point in a skip, which was operated by a wire cable and hoist and upon steel rails from the Sweeney level to said place, the cable raising and lowering said skip being wound on a drum, which was a *part the* equipment constituting said hoist.

III.

That on said date, and at or before the hour of 7:30 A. M., the plaintiff got into the said skip for the purpose of being hoisted to said level where he was engaged as aforesaid, and by reason of the negligence and carelessness of the defendant in failing to maintain an indicator upon said hoist to show the position of said skip, in the slipway, which was operated on steel rails at an incline of about 45 degrees or more, and in operating the same with a

*Page-number appearing at foot of page of original certified Record.

worn and defective cable, the defendant and its employees in charge of said hoist were unable to determine the location of said cable and negligently ran the same at a high rate of speed into the sheave while at the top of said skipway, catching the plaintiff's right leg between the top of said skipway and the timbers of said skip, crushing and bruising the flesh thereof and breaking the large bones of plaintiff's right leg about six inches above the ankle thereof.

IV.

That it became and was necessary for the defendant to maintain a proper and sufficient indicator upon the said hoist, and to have a proper cable in order to determine the location of the skip in the skipway, and to know when the same had reached the top of said skipway and to prevent running same into the sheave-wheel and timbers at the top of said skipway; that the defendant negligently and carelessly failed and neglected to provide any indicator or to keep the cable of said skipway in proper repair, or to furnish a sufficient method **[2]** of signalling so as to avoid accidents and injuries to the persons riding in said skipway, and because thereof the plaintiff was injured as aforesaid.

V.

That by reason of the negligence and carelessness of the defendant as aforesaid, and the injuries which the plaintiff sustained, the plaintiff suffered severe and excruciating pain for more than a month after the said accident, and was confined to the hospital for a period of ten weeks, and is and has been since said time unable to follow his occupation as a mucker

or any other occupation, and is able only with difficulty to walk upon said foot, and will not be able to engage in any labor requiring the use or exercise of said limb for a long time to come, and plaintiff will continue to suffer on account of said fracture, and said limb is and will continue to be weakened, shortened, crooked and sore during the remainder of his life.

VI.

That at the time of the happening of the said accident, the plaintiff was of the age of 22 years, and was earning wages at the rate of $3.00 per day, and because of said injury, and the pain and suffering he has endured, and will continue to endure, and his inability to work and earn a living, and the permanency of said injuries in the sum of ($12,500) Twelve Thousand and Five Hundred Dollars.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Twelve Thousand and Five Hundred Dollars, and for his costs and disbursements herein.

WALTER F. MORRISON,
ROBERTSON & MILLER,
Attorneys for Plaintiff. **[3]**

United States of America,
State of Washington,
County of Spokane,—ss.

C. H. Hodge, being first duly sworn, upon his oath deposes and says: That he is the plaintiff named in the foregoing complaint, that he has read over the same, knows the contents thereof and that the same is true of his own knowledge, except as to the

matters therein stated to be upon information and belief, and as to them he believes it to be true.

C. H. HODGE.

Subscribed and sworn to before me on the 5th day of August, A. D. 1912.

[Seal] FRED MILLER,
Notary Public for the State of Washington, Residing at Spokane, Washington.

[Endorsed]: Filed Aug. 12, 1912. A. L. Richardson, Clerk. **[4]**

In the District Court of the United States, in and for the District of Idaho, Northern Division.

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Defendant.

Demurrer [to Complaint].

Comes now the defendant and demurs to the complaint of the plaintiff heretofore filed herein and for causes of demurrer alleges:

1. That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

2. That said complaint is ambiguous and uncertain in this,—

(a) That said complaint fails to show in what

particular the defendant was negligent in the cable mentioned in said complaint.

(b) In what particular the said cable was defective, or in what manner the said cable caused the alleged injury to the said plaintiff.

(c) Said complaint fails to show in what way the said cable used on the said skip was not a proper cable for use on the said skip.

(d) The said complaint fails to show in what way the system of signalling used by the defendant was insufficient.

(e) Said complaint fails to show in what particular the said cable was not in proper repair, and fails to show that the alleged injury to the plaintiff was in any way caused by the condition of the cable or caused by the said cable at all.

[5]

WHEREFORE, defendant prays judgment of this its demurrer that it be dismissed hence with its costs herein sustained.

FEATHERSTONE & FOX,
Attorneys for Defendant,
Wallace, Idaho.

State of Idaho,
County of Shoshone,—ss.

W. J. Hall, being first duly sworn, deposes and says: I am the Assistant General Manager of Federal Mining & Smelting Company, the above-named defendant, and duly authorized by said company to make this verification for and on behalf of the said Federal Mining & Smelting Company; and that the

foregoing demurrer is not interposed for delay and the same is true in point of fact.

W. J. HALL.

Subscribed and sworn to before me this 7th day of September, 1912.

[Seal] ROY H. KINGSBURY,
Notary Public.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

A. H. FEATHERSTONE,
Attorney for Defendant.

[Endorsed]: Filed Sept. 9, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. **[6]**

In the District Court of the United States for the District of Idaho, Northern Division.

#554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Defendant.

Notice [That Demurrer to Complaint will be Called for Hearing].

To the Defendant, the Federal Mining & Smelting Company, a Corporation, and to Featherstone & Fox, Defendant's Attorneys:

You, and each of you, will please take notice that

on the incoming of court, on the 18th day of November, 1912, at Coeur d'Alene, Idaho, plaintiff will call up for hearing and final determination defendant's demurrer to the plaintiff's complaint now on file in the above-entitled action.

ROBERTSON & MILLER,
W. F. MORRISON, Jr.,
Attorneys for Plaintiff.

Service of the above Notice, by a true and correct copy thereof, is accepted this 12th day of October, 1912, at Wallace, Idaho.

A. H. FEATHERSTONE,
Attorney for Defendant.

[Endorsed]: Filed Nov. 14, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [7]

At a stated term of the District Court of the United States for the District of Idaho, held at Coeur d'Alene, Idaho, on Monday, the 18th day of November, 1912. Present: Hon. FRANK S. DIETRICH, Judge.

No. 554.

C. H. HODGE

vs.

FEDERAL MINING & SMELTING COMPANY.

Order Sustaining Demurrer [to Complaint, etc.]

On this day this cause came on to be heard upon the demurrer to the complaint herein, and after argument by counsel and upon consideration the Court ordered that said demurrer be sustained, and the

plaintiff is given ten days from this date in which to file and serve an Amended Complaint. [8]

In the District Court of the United States for the District of Idaho, Northern Division.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Defendant.

Stipulation [Extending Time to December 7, 1912, to File Amended Complaint].

It is hereby stipulated and agreed by and between Featherstone and Fox, attorneys for the defendant herein, and Robertson and Miller and W. F. Morrison, Jr., attorneys for the plaintiff herein, that plaintiff shall have an extension of time in which to file his amended complaint in the above-entitled action in the above-entitled court. That said extension of time shall be to and including the 7th day of December, 1912.

Dated this 29th day of November, A. D. 1912, at Coeur d'Alene, Idaho.

FEATHERSTONE & FOX,
Attorneys for Defendant.
ROBERTSON & MILLER,
W. F. MORRISON, Jr.,
Attorneys for Plaintiff.

[Endorsed]: Filed December 7, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [9]

In the District Court of the United States for the Eastern District of Idaho, Northern Division.

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Defendant.

Amended Complaint.

Comes now the plaintiff, and by order of Court herein filed this his amended complaint.

I.

That at all the times hereinafter mentioned the defendant was and now is a corporation, created, organized and existing under and by virtue of the laws of the State of New Jersey, and is a citizen of said State, and has complied with the laws of the State of Idaho relative to foreign corporations doing business therein, and owns and operates the Last Chance Mine, a silver and lead quartz mine at the town of Wardner, Shoshone County, Idaho, and that the plaintiff was at all of the times herein mentioned and now is a citizen and resident of the State of Idaho.

II.

That on the 17th day of May, A. D. 1912, and for more than one month prior thereto, the plaintiff was and had been in the employ of the defendant as a mucker, on the fourth level of the Last Chance Mine

about 450 feet from the "D" hoist, which is about 480 feet above the Sweeney level, and that in order to reach the workings in said mine where the defendant was engaged he was required to ride from the Sweeney level to the said point in a skip, which was operated [10] by a wire cable and hoist and upon steel rails from the Sweeney level to said place, the cable raising and lowering said skip being wound on a drum, which was a part of the equipment constituting said hoist.

III.

That the said defendant on the date aforementioned and for some time prior thereto, had negligently and carelessly permitted its hoist and machinery used in raising and lowering the said skip to become old, worn and defective; that the said skip was required to be properly equipped with a brake so that the same could be readily and quickly stopped; that the said skipway was dark and unlighted; that the means provided for the plaintiff to go to the various workings of the mine was by the use of said skip; that the said skip as aforesaid was operated by a wire cable running from a drum; that the said cable was old, out of repair and worn; that by reason thereof, in winding and entwining the said cable and in letting the same out along said skipway sometimes the cable would entwine around the said drum evenly and sometimes unevenly, and there was no method of determining how much of the said cable was taken up in each revolution of the said drum because the said cable was old, worn, and uneven in size, and there were no means provided for said cable to en-

twine around said drum evenly.

IV.

That in operating the said hoist it was practically impossible to know the exact location of the said skip when being hoisted or to determine the location thereof; that it became necessary in order to determine the exact location of the said skip to have an indicator at said hoist so connected with the skip by electric current or otherwise as to fix the location of said skip, which said indicator was an ordinary precaution necessary to be taken by the said defendant, or that it was necessary to fix some appliance or indicator on the [11] sheave-wheel or drum, or hoist so as to tell the exact position of the said skip.

V.

That at the time of the happening of the said accident the said defendant negligently failed to maintain its said appliance in a safe and proper condition or to properly light the premises, and negligently failed to provide a brake on said hoist so that the same could operate quickly, and failed to furnish any sufficient or proper indicator, and negligently furnished the said old and defective cable so that instead of stopping, or causing to be stopped, the skip, in the skipway provided therefor at the top of said skipway, the defendant ran the said skip at a high rate of speed, and because of said condition the same could not and was not stopped at the proper place on account of the negligence of the defendant as aforesaid, but ran into the sheave-wheel at the top of the said skipway, catching the plaintiff's right

leg between the top of said skipway and the timbers of said skip, crushing and bruising the flesh thereof and breaking the large bone of plaintiff's right leg about six inches above the ankle thereof.

VI.

That the negligence of the said defendant was because it failed to furnish proper appliances as aforesaid, or to keep the same in proper shape, and because of its negligence in failing to maintain a proper and sufficient indicator upon said hoist to locate the position of said skip, and in negligently having a cable that was entwined around the said drum unevenly as the said old and defective cable did, and further in failing to stop the said skip at the top of said skipway, and the said defendant further neglected to provide a cushion or appliance at the top of said skipway to prevent the said skip from running against the said sheave-wheel [12] and timbers at the top of said skipway, and in neglecting and failing to provide a proper top to said skip so as to render it safe under said condition, and in failing to furnish a safe place in said skip for this plaintiff to stand to avoid accidents to persons riding in said skip, and in failing to provide proper rules for operating said skip so as to notify the employees of the said defendant, the skipmen and passengers on said skip where the same would be stopped, and that because of said negligence as above set forth the said plaintiff was, while in the exercise of due care on his part, and solely because of defendant's said negligence, injured as herein set forth.

VII.

That by reason of the negligence and carelessness of the defendant as aforesaid, and the injuries which the plaintiff sustained, the plaintiff suffered severe and excruciating pain for more than a month after the said accident, and was confined to the hospital for a period of ten weeks, and is and has been since said time unable to follow his occupation as a mucker or any other occupation, and is able only with difficulty to walk upon said foot, and will not be able to engage in any labor requiring the use or exercise of said limb for a long time to come, and plaintiff will continue to suffer on account of said fracture, and said limb is and will continue to be weakened, shortened, crooked and sore during the remainder of his life.

VIII.

That at the time of the happening of the said accident the plaintiff was of the age of 22 years, and was earning wages at the rate of $3.00 per day, and because of said injury, and the pain and suffering he has endured, and will continue to endure, and his inability to work and earn a living, [13] and the permanency of said injuries in the sum of Twelve Thousand and Five Hundred Dollars ($12,500.00).

WHEREFORE, plaintiff prays judgment against the defendant for the sum of TWELVE THOUSAND AND FIVE HUNDRED DOLLARS ($12,500.00), and for his costs and disbursements herein.

ROBERTSON & MILLER,
W. F. MORRISON, Jr.,
E. W. ROBERTSON,
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

E. W. Robertson, being first duly sworn, on his oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled cause, that he has read the foregoing complaint, knows the contents thereof and that the same are true except as to the matters and facts therein stated on information and belief, and as to them he believes them to be true, and that he makes this verification for and on behalf of the plaintiff, because the plaintiff is not now within the State of Washington.

E. W. ROBERTSON.

Subscribed and sworn to before me this 3d day of December, 1912.

[Seal] DORA BEACH,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash. [14]

In the District Court of the United States for the District of Idaho, Northern Division.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Defendant.

AFFIDAVIT OF SERVICE BY MAIL.

State of Idaho,
County of Kootenai,—ss.

W. F. Morrison, Jr., being first duly sworn, on oath deposes and says: That he is one of the attorneys for the above-named plaintiff; that on the 7th day of December, 1912, affiant served upon the attorneys for the defendant, Featherstone & Fox, residents of the city of Wallace, Shoshone County, Idaho, the original amended complaint herein by enclosing a copy of the same in an envelope, sealing said envelope with a copy of said amended complaint enclosed therein, which envelope was addressed to said Featherstone & Fox, at Wallace, Idaho, and deposited said envelope containing a copy of said amended complaint in the postoffice at Coeur d'Alene, Idaho, and prepaid the postage thereon, and had said letter registered, the registry receipt for which is hereto attached, made a part hereof and marked Exhibit "A."

That the residence of the attorneys for the plaintiff, Robertson & Miller, is Spokane, Washington; that the residence of the attorney for the plaintiff, W. F. Morrison, Jr., is Coeur d'Alene, Idaho; and that there is a regular communication by mail between said City of Coeur d'Alene, Idaho, and said Wallace, Idaho; [15] and a United States postoffice at both of said places.

W. F. MORRISON, Jr.

Subscribed and sworn to before me this 7th day of December, 1912.

[Seal] W. F. McNAUGHTON,
Notary Public.

Exhibit "A."

Letter No. 2641.

Received for registration, Dec. 7, 1912, from W. F. Morrison, Jr., addressed to Featherstone & Fox, Wallace, Idaho.

Postmaster,
Per K.

[Endorsed]: Filed December 7, 1913. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. **[16]**

In the District Court of the United States, in and for the District of Idaho, Northern Division.

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Defendant.

Demurrer to Amended Complaint.

Comes now the defendant, Federal Mining & Smelting Company, and demurs to the amended complaint of the plaintiff heretofore filed herein, and for cause of demurrer, alleges:

1. That said complaint does not state facts suffi-

cient to constitute a cause of action against the defendant.

2. That said complaint is ambiguous and uncertain in this:

(a) That said complaint fails to show in what particular the defendant was negligent or careless in using its hoist and machinery mentioned in said complaint, or in what particular the same was defective.

(b) In what particular the said cable mentioned in said complaint was defective, or in what manner the said cable caused the alleged injury to the said plaintiff.

(c) Said complaint fails to show in what way the said cable used on said skip was not a proper cable for use on the said skip.

(d) Said complaint fails to show in what was the system of signaling used by the said defendant was insufficient, or in what way the system of signaling, in any way, contributed to the injury alleged by the plaintiff. **[17]**

(e) Said complaint fails to show that the alleged injury to the plaintiff was in any way caused by the condition of the said cable or caused by the said cable at all.

WHEREFORE defendant prays judgment of this its demurrer that it be dismissed hence with its costs herein sustained.

FEATHERSTONE & FOX,
Attorneys for Defendant, Wallace, Idaho.

State of Idaho,
County of Shoshone,—ss.

W. J. Hall, being first duly sworn, deposes and says: I am the Assistant General Manager of the Federal Mining & Smelting Company, the above-named defendant, and duly authorized by said company to make this verification for and on behalf of the said Federal Mining & Smelting Company; and that the foregoing demurrer is not interposed for delay and the same is true in point of fact.

W. J. HALL.

Subscribed and sworn to before me this 16th day of December, A. D. 1912.

[Seal] ALBERT H. FEATHERSTONE,
Notary Public.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBERT H. FEATHERSTONE,
Attorney for Defendant.

[Endorsed]: Filed Dec. 19, 1912. A. L. Richardson, Clerk. **[18]**

In the District Court of the United States for the District of Idaho, Northern Division.

No. 554.

C. H. HODGE,
Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,
Defendant.

Order Overruling Demurrer [to Amended Complaint].

The demurrer of the defendant to the amended complaint of the plaintiff herein having been submitted without argument, and the attorneys for plaintiff and defendant herein having orally agreed that the same shall be overruled, and the defendant given to the 1st day of May within which time to file its answer, it is hereby

ORDERED, That the defendant's demurrer to the plaintiff's complaint in the above-entitled action be and the same is hereby overruled, with leave to the defendant to serve and file its answer on or before the 1st day of May, 1913.

FRANK S. DIETRICH,
District Judge.

Due service of the within and foregoing Order, by a true, full and correct copy thereof, is hereby accepted at Wallace, Idaho, this 12th day of April, 1913.

FEATHERSTONE & FOX,
Attorneys for Defendant.

[Endorsed]: Filed April 17, 1913. A. L. Richardson, Clerk. [19]

In the District Court of the United States for the District of Idaho, Northern Division.

No. 554.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Defendant.

Answer to Amended Complaint.

Comes now the defendant, Federal Mining & Smelting Company, and answering the amended complaint of the plaintiff heretofore filed herein admits, denies and alleges, as follows:

I.

Admits all of the allegations contained in paragraph one, except that this defendant denies that it is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and allege the fact to be that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

II.

Answering paragraph two of the plaintiff's amended complaint, defendant admits that on the 17th day of May, A. D. 1912, and for more than one month prior thereto plaintiff was and had been in the employ of the defendant as a mucker on the fourth level of the Last Chance Mine about 450 feet

from the "D" hoist and about 480 feet above the Sweeney level, and defendant admits that in order to reach the workings in said mine where the plaintiff was engaged, the said plaintiff was allowed to ride from the Sweeney level to said point in the skip, which was operated by wire cable and hoist [20] upon steel rails from the Sweeney level to said place; denies that plaintiff was required to ride on said skip, and alleges the fact to be that the men were allowed to ride upon the said hoist in going to and from their work, the said hoist being for the purpose of raising timbers and steel and other supplies from the said Sweeney level to the various places where defendant was operating said mine, and if the said plaintiff rode upon said hoist, he did so for his own convenience.

III.

Answering paragraph three of plaintiff's amended complaint, defendant denies that on the date before mentioned, to wit, the 17th of May, 1912, and for some time or any time prior thereto, defendant negligently and carelessly, or otherwise, permitted its hoist and machinery used in raising and lowering the said skip to become old, worn and defective or worn or defective; denies that the said skip was required to be equipped with a brake so that the same could be readily and quickly stopped, and denies that it was possible to equip such a skip with a brake so that it could be stopped; denies that said skipway was dark and unlighted; denied that the only means provided for the plaintiff to go to the various workings of the mine was by the use of said skip, and alleges the fact

to be that plaintiff and all other workmen were allowed to ride upon said skip in going to and from their places of work, and alleges the fact to be that ladders are and were also provided for the use of said workmen in going to and from their work at the various points in said mine; admits that the said skip was operated by a wire cable running from a drum, but denies that the said cable was old or out of repair or worn, and alleges the fact to be that said cable was a good cable and in good repair and of sufficient size and strength for the use for which it was intended to be used and for which it was used; denies that by reason of the said cable being old or worn or out of repair, or otherwise, that in winding and entwining the said cable [21] and in letting the same out along said skipway sometimes the cable would entwine around the said drum evenly and sometimes unevenly, and denies that there was no method of determining how much of said cable was taken up in each revolution of said drum because the said cable was old, worn and uneven in size, and denies that there were no means provided for said cable to entwine around said drum evenly.

IV.

Answering paragraph four of plaintiff's amended complaint, defendant denies that in operating the said hoist it was practically impossible to know the exact location of said skip when being hoisted or to determine the location thereof; and defendant alleges the fact to be that the said cable was marked so the location of the said skip could be determined; denies that it became necessary in order to determine the

exact location of the said skip to have an indicator at said hoist so connected with the skip by electric current or otherwise as to fix the location of said skip; denies that the said indicator was an ordinary precaution necessary to be taken by the said defendant, and denies that it was necessary to fix some appliance or indicator on the sheave-wheel or drum or hoist so as to tell the exact position of the said skip.

V.

Answering paragraph five of plaintiff's amended complaint, defendant denies that at the time of the happening of the accident, or at any other time or at all, the said defendant negligently failed to maintain its appliance in a safe and proper condition, or to properly light the premises, and denies that the defendant negligently failed to maintain or provide a brake on said hoist so that the same could operate quickly, and denies that defendant failed to furnish any sufficient or proper indicator; denies that defendant negligently furnished an old or defective cable; denies that by reason of the cable being old, worn or defective that [22] instead of stopping, or causing to be stopped, the skip in the skipway provided therefor at the top of said skipway, the defendant ran the said skip at a high rate of speed, and denies that because of the condition of the same, the skip could not and would not stop at the proper place, and denies that it was on account of the negligence of the defendant, but alleges the fact to be that the said skip, hoist and raise were properly equipped with signals for stopping the said skip at any point desired by the persons riding upon the

said skip, and that the said plaintiff negligently and carelessly and against the positive rules of the defendant company, got upon the bail of said skip, and said plaintiff negligently and carelessly neglected to signal the hoisting engineer to stop the said skip at the point where plaintiff wished to get off said skip to get to his place of work.

VI.

Denies that there was any negligence on the part of the defendant in failing to furnish proper appliances or to keep the same in proper shape, and denies that by reason of any negligence of the defendant in failing to maintain a proper and sufficient indicator upon said hoist to locate the position of the said skip, that the plaintiff received any of the injuries alleged in his said amended complaint, or any other injuries; denies that the defendant was negligent in having a cable that was entwined around the said drum unevenly, and denies that the cable was worn or old or defective, or that it entwined around the said drum unevenly; denies that the defendant was negligent in failing to stop said skip at the top of said skipway; denies that the defendant was negligent in failing to provide a cushion or appliance at the top of said skipway to prevent the said skip from running against the said sheave-wheel and timbers at the top of said skipway; denies that the defendant was negligent in failing to provide a proper top for the said skip so as to render it safe under said conditions; denied that the defendant was negligent in failing to furnish a safe place in said [23] skip for this plaintiff to stand, but alleges the fact to be

that said defendant did furnish a safe place on said skip where the said plaintiff could have stood and rode with perfect safety, and if the said plaintiff had been in a proper place upon said skip he would not and could not have been injured; denies that defendant was negligent in failing to furnish a proper method of signalling, but alleges the fact to be that this defendant did furnish a proper and sufficient method of signalling so as to avoid accidents to persons riding in said skip; denies that defendant was negligent in failing to provide rules for the operating of said skip so as to notify the employees of the said defendant, and alleges the fact to be that the rules of the defendant of which the plaintiff well knew provided that the plaintiff and all other workmen were forbidden to ride upon the bail of said or any skip in going to and from their work; denies that the hoistman running said hoist and that the plaintiff and other workmen riding on said skip were not notified where and how the skip could be stopped, but alleges the fact to be that the plaintiff well knew how to stop said skip, and that all of the passengers, workmen and hoistman who was running the said hoist operating said skip well knew the manner in which the skip was stopped, and how the signals were given for the stopping of the same; denies that on account of any negligence of the defendant, the plaintiff was injured, and denies that the plaintiff was injured while in the exercise of due or any care on his part, but alleges the fact to be that he was injured by reason of his own negligence and carelessness in failing to observe the rules of

the company and in attempting to rise upon the bail of the said skip in a position and place where he well knew he was in danger of being injured.

VII.

Answering paragraph seven of plaintiff's amended complaint, defendant denies that by reason of the negligence and carelessness [24] of the defendant as set forth in said amended complaint or otherwise, or by reason of the injuries which the plaintiff sustained, the plaintiff suffered severe and excruciating pain for more than one month after said accident; denies that he was confined to the hospital for a period of ten weeks, and denies that he has been since said time unable to follow his occupation as a mucker or any other occupation, and denies that he is only able with difficulty to walk upon said foot, and denies that he will not be able to engage in any labor requiring the use or exercise of said limb for a long time to come or for any time; denies that plaintiff will continue to suffer on account of said fracture, and denies that said limb is and will continue to be weakened, shortened, crooked or sore during the remainder of the life of plaintiff or during any time at all, and alleges the fact to be that plaintiff is now and for more than ——— months last past, has been able to follow his usual occupation of mining and has been employed in and about the mines in the vicinity of Wardner, Idaho, and at the same or higher daily wages than he received prior to the said alleged injury.

VIII.

Answering paragraph eight of plaintiff's amended

complaint, defendant has no information or belief as to the age of the plaintiff, and therefore denies that he is only of the age of twenty-two years; admits that plaintiff was earning wages at the rate of three dollars per day, but denies that because of said injury or because of the pain and suffering he has endured or will continue to endure, or of his inability to work and earn a living or the permanency of his said injuries or any of the said injuries, plaintiff has been injured in the sum of Twelve Thousand Five Hundred Dollars (($12,500), or in any other sum, or injured at all. [25]

For a separate and affirmative defense, the defendant alleges that if plaintiff was injured as alleged in plaintiff's amended complaint, he was injured by and through the negligence of a fellow-servant and not through the negligence and carelessness of the defendant company.

For a further, separate and affirmative defense, the defendant alleges that if the said plaintiff was injured as alleged in plaintiff's amended complaint, or injured at all, he was injured by reason of his own carelessness and negligence in riding upon the bail of said skip in disobedience of the rules, regulations or orders of the said defendant company, and by reason of his own negligence and carelessness in failing to give the signal to the hoisting engineer to stop the said skip at the proper place, or to give any signal to the hoisting engineer whatever, and the carelessness, fault and negligence of the said plaintiff brought about said injuries, and each thereof, and they were not sustained through or received by

or through any fault, negligence or carelessness of this defendant.

That when said defendant entered into said employment as a laborer in said mine as set forth in the amended complaint of the plaintiff, as a part of the consideration of his employment the said plaintiff agreed to assume, and he did assume, all risks and hazards of the character which brought about the alleged injuries, and did agree to assume all the risks and hazards brought about by reason of the acts of his fellow servants.

That if the said plaintiff was injured as in his amended complaint alleged or injured at all, said injury resulted from the risks and hazards of his employment which the plaintiff assumed when he entered the employment as a laborer in said mine, all of which were known to and assumed by him. That if plaintiff received the injuries complained of, he had at and up to the time he received the same and each thereof, full knowledge of the condition of the said skip and of the skipway and of the hoist and of the [26] signals by which the said skip was stopped, and assumed the risk thereof and therein at the time and place of receiving the said alleged injuries if he ever received the same or any thereof.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements herein expended.

FEATHERSTONE & FOX,
Attorneys for Defendants.

State of Idaho,
County of Shoshone,—ss.

William J. Hall, being first duly sworn, deposes and says: That he is the Assistant General Manager of the Federal Mining & Smelting Company, a corporation, the defendant above named, and is duly authorized by said company to, and makes this verification for and on behalf of the said defendant corporation; that he has read the foregoing answer and knows the contents thereof, and believes the same to be true.

WILLIAM J. HALL.

Subscribed and sworn to before me this 29th day of April, A. D. 1913.

[Seal] ROY H. KINGSBURY,
Notary Public.

Service of the within answer is hereby accepted and the receipt of a true and correct copy thereof acknowledged at Coeur d'Alene, Idaho, this 30th day of April, A. D. 1913.

ROBERTSON & MILLER,
W. F. MORRISON, Jr.,
Attorneys for Plaintiff.

[Endorsed]: Filed May 5, 1913. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [27]

United States District Court, Northern Division, District of Idaho.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess the damages at the sum of One Thousand Dollars ($1,000.00).

B. S. LAFFERTY,

Foreman.

[Endorsed]: Filed June 11, 1913. A. L. Richardson, Clerk. **[28]**

In the District Court of the United States for the District of Idaho, Northern Division.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a CORPORATION,

Defendant.

Judgment.

Came again the said plaintiff, with his attorneys, and the said defendant, by its attorneys, and came again also the jury heretofore impaneled and sworn

herein, when the trial of this cause was again resumed and the jury having heard the testimony, listened to the arguments of counsel and received the charge of the Court, upon their oaths do say they find the issues herein joined to be in favor of the said plaintiff and against the said defendant, and that they assess the amount of the plaintiff's damage and recovery herein against the defendant at the sum of One Thousand Dollars ($1,000).

On motion of the plaintiff it is therefore hereby considered by the Court that said plaintiff, C. H. Hodge, do have and recover of and from said defendant, the Federal Mining and Smelting Company, a corporation, said sum of One Thousand Dollars ($1,000.00), and the costs of this suit in the sum of One Hundred Sixty-six and 80/100 Dollars ($166.80), for the collection of which said sum and costs, execution is hereby awarded.

Judgment rendered June 11, 1913.

[Endorsed]: Filed June 11, 1913. A. L. Richardson, Clerk. **[29]**

In the District Court of the United States for the District of Idaho, Northern Division.

C. H. HODGE,

Plaintiff,

vs.

THE FEDERAL MINING & SMELTING COMPANY,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore and on, to wit, the 11th day of June, A. D. 1913, being one of the days of the —— Term of the District Court of the United States for the District of Idaho, Northern Division, before the Honorable Frank S. Dietrich, presiding as Judge of said court and a jury, this cause came on for trial on the pleadings heretofore filed herein, Messrs. Rosenhaupt & Miller and W. F. Morrison appearing for the plaintiff and Messrs. Featherstone and Fox appearing for the defendant, and thereupon the plaintiff, to maintain the issues on his part, introduced the following evidence, to wit: **[30]**

[Testimony of George H. Kennett, for Plaintiff.]

GEORGE H. KENNETT, a witness duly called and sworn on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. State your name.

A. George H. Kennett.

Q. Where do you reside? A. Kellogg, Idaho.

Q. How long have you resided there?

A. About six years.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you been practicing as physician and surgeon?

A. How long have I been practicing as physician and surgeon?

(Testimony of George H. Kennett.)

Q. Yes. A. Eleven years.

Q. Of what school are you a graduate?

A. Rush Medical College of Chicago.

Q. Regularly admitted to practice in the state of Idaho? A. I am.

Q. Do you know the plaintiff, Mr. Hodge?

A. I do.

Q. Did you at any time make any examination of his leg for an injury? A. I did.

Q. When?

A. Well, he was in the hospital of which I have charge, Wardner hospital, at Kellogg, for about three months, I believe; I don't remember the dates exactly.

Q. What was the nature of the injury? **[31]**

A. He had a fracture of the large bone—I don't remember whether the right or left leg.

Q. Whereabouts in the leg was it?

A. A little bit below the middle of the leg, that is, between the knee and ankle.

Q. What was the nature of the fracture?

A. It was a simple fracture.

Q. More than one break?

A. No; there was only one bone broken; and it was what is known as an impacted fracture, that is, the ends of the bones after being fractured were driven together, so that it made it appear as though the leg wasn't fractured when you handled it.

Q. He was in your charge how long?

A. Oh, I think about three months—well, of course, he was in the hospital that long.

(Testimony of George H. Kennett.)

Q. What kind of a result did you get in the leg?

A. I considered it a perfect result.

Q. What is the effect of the fracture upon the leg as to weakening the leg in the future, making it subject to rheumatism?

A. Oh, if a person is subject to or has an attack of rheumatism, it is liable to settle in any part that is injured, your leg or back or anything else.

Mr. FOX.—I submit that is speculative.

The COURT.—Overruled.

Q. Is it more apt to do that than in any portion of the anatomy, than where there is not a fracture or injury? A. Yes, I think so.

Q. How does it affect them as age comes on?

A. I don't understand your question.

Q. I mean when a person who has a fracture in youth gets old, is the leg more apt to trouble him than if the fracture had not occurred? **[32]**

A. I think not, so far as the bone is concerned.

Q. Is there much pain accompanying a fracture of this character? A. Very little.

Q. Was there any laceration of the flesh around the fracture? A. None.

Q. Either externally or internally?

A. Well, yes, there was; there always is some injury to the soft parts, yes.

Q. Did you take an X-ray of it?

A. Yes; we took several X-rays, Dr. McCracken and myself in conjunction.

Q. Have you the plates which you took?

A. Have I them?

(Testimony of George H. Kennett.)

Q. Yes. A. No.

Q. Would you be able to identify them if you saw them? A. I think I would, yes.

Q. I hand you these dark colored square pieces of glass, and ask you if you can identify them, and what they are, four pieces of glass.

A. There are four of them. They are all X-ray pictures of Mr. Hodge's fractured leg.

Q. What are these glasses which you have been looking at? What are they?

A. These are the X-ray negatives.

Q. And they are produced how? How do you take them? That is, how do you take an X-ray picture?

A. You want me to describe the method? **[33]**

Q. Yes.

A. Well, you have some form of generating the current which you use—I have an induction coil—and you pass the current through what we call an X-ray tube, and place the leg between the tube and the plate, and expose them to the current for a certain length of time, and develop them.

Q. In what part of this largest glass which I show you is the bone of the leg?

A. The middle of it; the part that shows the lightest in the picture.

Q. That is, the solid substance in the object shows white on the negative?

A. Yes. That is in a cast, that one is, taken through a cast.

Q. Does that show the fracture of the leg, Doctor?

(Testimony of George H. Kennett.)

A. Yes.

Q. Where?

A. What do you mean—so far as the picture is concerned, or so far as the leg is concerned?

Q. So far as the picture is concerned.

A. Right in the center of the plate.

Mr. MILLER.—We offer this largest photograph in evidence.

Mr. FOX.—Q. Doctor, you say you haven't had these plates in your possession?

A. No.

Q. Where have they been, if you know?

A. I think Mr. Hodge has had them.

Q. How did he get hold of them?

A. I think he took them when he left the hospital.

Q. Since that time you haven't seen these plates?

[34] A. No.

Q. You are not positive that these are the plates that you took, are you Doctor?

A. Well, practically so, yes.

Q. Practically so? A. Yes, sir.

Q. And for all practical purposes you would say that these are the plates? A. Yes.

Mr. FOX.—Very well. I have no objection.

Mr. MILLER.—Q. What length of time had elapsed subsequent to the fracture when this picture was taken, Doctor?

A. Oh, I don't know; probably two weeks, something like that.

Mr. MILLER.—I will mark this with the figure "1," temporarily.

(Testimony of George H. Kennett.)

Q. I show you one, Doctor, marked with the figure "2," and ask you when that was taken.

A. I think that was taken at the same time as the—let's see—I don't recall when they were taken; they were taken some time after the accident; I don't recall just when.

Q. That is a picture of his leg anyway?

A. Yes, it is a picture of his leg.

Mr. MILLER.—We offer No. 2 in evidence.

Mr. FOX.—There will be no objection if the doctor thinks that these are the plates, if the Court please.

Q. I call your attention to one marked with the figure "3," and ask you what that is.

A. That is a picture of Mr. Hodge's leg, of the fracture, showing just at the upper corner. That was taken before the leg was put in a cast. **[35]**

Q. That which looks like a crack or crevice there is the fracture, is it? A. Yes.

Q. I show you the one marked with the figure "4" in lead pencil, and ask you what that is.

A. That is also a picture of Mr. Hodge's leg. It is the anterior posterior view taken before the cast was put on. The other was the lateral view.

Mr. MILLER.—We offer this one in evidence also. You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. Doctor, you say this was an impacted fracture?

A. Yes, sir.

Q. That is produced by pushing the bone together, something being on the heel or the foot and some-

(Testimony of George H. Kennett.)

thing on the knee and pushing the bone together?

A. In all probability, yes.

Q. Now, you say he was three months in the hospital? A. I think about.

Q. It was ten weeks, wasn't it?

A. I don't know about that.

Q. There was no perceptible shortening of the leg?

A. No perceptible, no, sir.

Q. No toeing in or toeing out?

A. No; I think the leg is normal.

Q. You have taken an X-ray picture recently in connection with Dr. Smith, haven't you?

A. Yes, sir.

Q. And could you identify those plates?

A. Yes. **[36]**

Q. Doctor, I hand you what is marked Defendant's Exhibit No. 1, for identification, and ask you to state if it isn't a fact that that is a photograph of a plate which you made, of an X-ray plate which you made of his leg recently, within the last month.

A. Yes.

Q. Showing the condition of the leg at the present time? A. Yes.

Q. Now, Doctor, I will hand you what is marked for identification Defendant's Exhibit No. 2. Defendant's Exhibit No. 1, Doctor, shows the break entirely healed, doesn't it? A. Yes.

Q. And likewise Defendant's Exhibit No. 2, for identification?

A. Yes, that is the picture of his leg.

Q. Defendant's Exhibit No. 1, for identification,

(Testimony of George H. Kennett.)
is taken looking at the leg from the front, isn't it?

A. Yes.

Q. And Defendant's Exhibit No. 2, for identification, is the interior aspect of the leg, that is, looking at the leg from the inside? A. Inside, yes.

Q. You say only the large bone was broken?

A. Yes.

Q. And the small bone was not fractured or broken? A. No.

Q. Doctor, did you ever see a better result of a fracture than this case presents?

A. I never have, no.

Mr. FOX.—That is all.

Mr. MILLER.—That is all, Doctor. You may be excused unless the other side wants you.

Mr. FOX.—I think we will not need the doctor further. **[37]**

[Testimony of O. D. Chism, for Plaintiff.]

O. D. CHISM, a witness duly called and sworn on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. What is your name?

A. Omar Daniel Chism.

Q. Where do you reside?

A. Wardner, Idaho.

Q. What is your business?

A. Well, the last three years I have been engaged in mining, that is, working in the mines; I guess you would call it mining.

(Testimony of O. D. Chism.)

Q. Where were you working on the 17th day of May, 1912?

A. I was working in the Chance mine on four level, for Walker Johnson.

Q. What department of the mining were you engaged in? A. Mucking, shoveling.

Q. Where is the location of the place where you were engaged from the entrance to the mine, how far from the entrance to the mine?

A. The outside entrance, you mean?

Q. Yes.

A. Oh, it is quite a ways. It must be—I don't know exactly how many feet, but something like—well, I would think almost half a mile.

Q. At what particular place were you working on this day, that is, I call your attention to the time, Mr. Hodge was hurt.

A. What particular place?

Q. Yes.

A. Well, I was working in the workings up on four, in the McIntyre stope.

Q. Were you on the skip at the time Mr. Hodge was injured? [38] A. Yes, sir.

Q. Describe to the jury what a skip is, and what this skip was used for.

A. The location of the skip?

Q. What is a skip.

A. Well, the term "skip," I guess, what they call there, is just simply a carrier on four wheels, something like a car, has standards on it, four wheels, and two axles, and a couple of standards to hold by,

(Testimony of O. D. Chism.)

or keep the timbers on.

Q. How was this particular skip operated?

A. Why it was operated by a cable, and the power was air.

Q. How was the cable attached? A. To a drum.

Q. How to the skip?

A. Well, it was attached by a knuckle or a coupling from the rope to the bail.

Q. How was the skip operated up and down the skipway, that is, on what did it run? Were there any wheels under it, or anything? A. Yes.

Q. What did it operate on?

A. They operated on rails, "T" rails, iron rails.

Q. What was the length of the skipway in which this particular skip was operated?

A. Well, of course, I don't know. The best of my knowledge I would think the distance would be about —well, 400 feet from the Sweeney up to four, where we got off.

Q. How many stations are there between the two points?

A. Between the Sweeney level and—?

Q. Between where the skip started and where it stops.

A. There was only two—four and five levels.

Q. And the levels are how far apart? [39]

A. Well, I don't know, but I would judge that it must be 300 feet from the hoist up to the first level, number five.

Q. How is the skipway lighted?

(Testimony of O. D. Chism.)

A. Why, with incandescent lights, about a No. 16, I guess.

Q. How many of those are there?

A. One at each station.

Q. And between them are there any lights?

Mr. FOX.—If your Honor please, I submit there is no allegation here that there was insufficient light.

Mr. MILLER.—Yes, there was an allegation that it was insufficiently lighted.

The COURT.—Yes, as I remember there was some such statement.

Mr. FOX.—Well, go ahead.

A. How was that question?

Q. Any lights between the stations? A. No, sir.

Q. What was there to hold the cable at the top of this skipway, that is, up—

A. I don't exactly catch your meaning.

Q. Well, what did the cable operate over, or to what was it attached, to hold it to the top of the skipway?

A. You mean how was the cable conveyed from the drum around back to the skipway?

Q. Yes.

A. By a sheave-wheel.

Q. Where was this sheave-wheel?

A. Well, this sheave-wheel was about, I should judge about fifteen feet from four level.

Q. That would be fifteen feet above it?

A. Yes, fifteen feet from the landing.

Q. Was there any light there? [40]

(Testimony of O. D. Chism.)

A. Yes, sir, there was a light at the station, at the landing.

Q. Any light up at the sheave-wheel?

A. No, sir.

Q. Just tell us about getting into this skip with Mr. Hodge, and what happened on the way up.

A. Well, we got in the skip as we do ordinarily, and had a full load, six, and we sped on up to five, and it seems we had two men on for five, and they got off at five, and I don't know just who gave them the signal—I couldn't say—but the engineer was given the signal to proceed; so we went on up to four. I was on the right-hand side of the upper deck, and after we came up—of course we can tell when we are getting up near the station, because you can see the chute and see the light, of course, so when we come up near the station I discovered that the engine was—there was no slack-up. I saw—well, I became excited a little bit. I saw we was going on up above the station, so I reached for the bell cord to signal him to stop, and at the rate we were going I had to give him a quick flash, because the string is only about four and a half feet long, and in passing this distance why I had to reach hurriedly in order to get the string.

Q. Just describe this string.

A. Well, there is a string, a small cord, that hangs across the station, that is used for signaling the engineer to lower or hoist, and we give flashes by pulling the string; one pull is to stop, and two is to go ahead, and so on. And I just caught the string in

(Testimony of O. D. Chism.)

time to flash, and I gave a very quick flash—that is, I say—I won't say—No; I will correct that. I won't say I gave a flash at all, because we pulled it so quick that I don't know whether it flashed or not.

Q. Why were you required to pull it quickly? [41]

A. Well, as I said, the reason I pulled it quickly was because, at the rate of speed we were going, I had no time to pull it slowly; it would have been impossible to pull it slowly, because it stands to reason that I had—that I couldn't have pulled it otherwise, because at the rate of speed we were going—

Q. What rate of speed does this skip travel up there, do you know?

A. Well, I couldn't say. I don't know just what—it is a single motion engine, I think. I don't know just what—I don't know the size of the drum, and I don't know the revolutions it makes, but I would judge something like—Oh, I would judge 250 feet a minute, something like that—200 feet a minute.

Q. Then what finally happened?

A. Well, after I gave the flash that is, after I pulled the string, of course there was no stop, we crashed into the bulkhead.

Q. What do you mean by that?

A. Well, the bulkhead is a large timber there, about—it must be 16 feet in diameter, that is, placed about three feet from the sheave-wheel, on account of protection.

Mr. FOX.—I guess the witness means sixteen inches in diameter.

(Testimony of O. D. Chism.)

A. Sixteen inches, yes, sir. It is placed about three feet from the sheave-wheel.

Q. Where was Mr. Hodge on the skip?

A. Well, Mr. Hodge was right above me. I was on the upper deck on the right-hand side going up, and Mr. Hodge was on the bail above me.

Q. How many men does that skip hold?

A. Why, six generally rides on it.

Q. How long had you been riding up and down in that skip?

A. Well, I have been riding up and down ever since it was [42] installed there.

Q. Was Mr. Hodge in a position usually occupied by some of the men in going up or down?

Mr. FOX.—I object, if the Court please. It makes absolutely no difference, if he puts himself in an unnecessarily dangerous position, whether other people did so or not. I submit that it is immaterial. It is all right for him to ask whether or not men rode up and down upon that skip, but as to whether or not other men took the chances that this man took in riding upon that bail is not material whatsoever, and I can show your Honor authorities to that effect.

Mr. MILLER.—Counsel certainly knows that there isn't anything before the Court and jury yet that he was in an unnecessarily dangerous position.

The COURT.—Objection sustained.

Q. What position did the men in going up in that skip occupy? How were they appointed around over the skip?

Mr. FOX.—It doesn't appear that anybody

(Testimony of O. D. Chism.)

pointed them around over the skip, so far as we know.

The COURT.—Read the question.

(Last question read.)

Mr. FOX.—If it is confined to this one particular case, I have no objection, but counsel is trying to get in the very thing your Honor just ruled out.

Mr. MILLER.—I don't understand that this is ruled out.

The COURT.—He may answer this question, as relates to this particular time when the accident occurred. How were the men located upon this skip?

A. There was two on the lower deck, and two on the upper deck, and one on the bail. I say the upper deck—well, there is a [43] piece of timber in the skip where we get on, that is, where we—

Q. Who was on the bail on this occasion?

A. On this occasion?

Q. Yes. A. Mr. Hodge.

Q. How was he situated, that is, how did he occupy the position? A. On the bail?

Q. Yes.

A. I couldn't say because I don't know.

Q. How fast was this skip running at the time it struck the bulkhead?

A. Well, I couldn't see that there was much change in the speed from the time we started.

Q. Did you see the position in which Mr. Hodge's leg was caught? A. No, sir, I did not.

Mr. MILLER.—You may cross-examine.

(Testimony of O. D. Chism.)

Cross-examination.

(By Mr. FOX.)

Q. Mr. Chism, you say that six men can ride upon this skip? A. Yes, sir.

Q. That is, two men would be practically sitting in the bottom? A. Yes, sir.

Q. With their feet against the dash board or the bottom board? A. Yes, sir.

Q. And two men would be sitting upon the cross-piece or bolster, as it is called, right in the center? [44] A. Yes, sir.

Q. And two men would be sitting upon the top bolster, or just below the bail?

A. No, that is wrong. There would be three men on the lower deck. There would be two men on the side and one man in the center.

Q. It isn't necessary for anybody to ride upon the bail in order for six men to be accommodated upon that skip? A. Well, yes, I would think so.

Q. It would be? A. Yes.

Q. In other words, it would only accommodate five men sitting in the skip? A. Yes.

Q. Now, Mr. Chism, that is a timber skip, isn't it, used for timber and for the hoisting up and down of tools and things of that kind, that is what it is primarily designated for, I will ask you?

Mr. MILLER.—I would like for counsel to ask a question and not make a speech to the witness every time.

Mr. FOX.—If your Honor please, I presume I have a right to ask the question in the form I see fit.

(Testimony of O. D. Chism.)

A. Of course, you said about it being a timber skip. Of course, it is used for hoisting timbers and steel and the like of that, but it is also used for hoisting men. Of course you might term it that, but there is men ride on it.

Q. But it is primarily designed for the purpose of hoisting timber, is it not?

A. Well, I couldn't say that it is specially put there for timber, no.

Q. The men rode upon that for their own convenience to get up there? There were other means by which the men could get up to [45] that work?

A. There was a skipway over "D."

Q. And there were ladders which they could climb?

A. No, I don't know of any ladders.

Q. You don't? A. No, I don't.

Q. You say the men did ride up there?

A. Yes, sir.

Q. You say you stopped upon the 500 foot level?

A. Yes, the five level.

Q. The five level? A. Yes, sir.

Q. And was it you who rang, or rather who pulled the rope which gave the signal to stop?

A. At five?

Q. Yes.

A. I couldn't say; I don't remember about that.

Q. But it was stopped in that manner, wasn't it?

A. Oh, yes.

Q. Did you come down back with the skip when they brought the plaintiff down?

A. No, sir, I did not.

(Testimony of O. D. Chism.)

Q. You stayed up there? A. Yes, sir.

Q. Did you see the signals operated at the time when they brought the plaintiff down?

A. Oh, yes, yes, sir.

Q. The skip was moved by means of this rope?

A. By the signal.

Q. By means of giving a signal with this rope?

A. Yes, sir. [46]

Q. That is, after the accident? A. Yes, sir.

Q. Now, you say that there were six of you riding upon that skip when you started at the—

A. From the Sweeney, yes, sir.

Q. And upon the five hundred foot level, or at the five level, whatever it is called, two men got off?

A. Yes, sir.

Q. Nothing to prevent the plaintiff, then, from getting off the bail and getting down into the skip, was there?

A. No, nothing to prevent him if he had spoken.

Q. Nobody else got hurt upon the skip except the plaintiff? A. No, not that I know of.

Q. He wouldn't have gotten hurt if he had sat inside—

Mr. MILLER.—I object to the question as calling for the conclusion of a witness.

Mr. FOX.—I think I might be permitted to finish my question.

The COURT.—Ask your question.

Q. He would not have been injured in this accident if he had sat in the skip, would he?

Mr. MILLER.—I object to that as calling for a

(Testimony of O. D. Chism.)

conclusion of the witness.

The COURT.—Overruled.

A. I don't think he would have been injured, no, if he had been inside the skip.

Mr. FOX.—That is all.

Redirect Examination.

(By Mr. MILLER.)

Q. How long did the skip stop there at five level?

A. Oh, just for a few minutes; maybe two minutes, just long [47] enough for a couple of men to get off.

Q. Do you know where they got out of, what part of the skip?

A. To the best of my knowledge they got out on the lower floor, on the lower deck.

Q. Then the other two fellows were on the floor right below him, below the plaintiff, on the seat below him?

A. Well, myself, I was just below him.

Q. No room for him there?

A. Not unless I would move down on the first station, that is, the first landing of the skip.

Q. How long have men been riding up and down on that skip?

A. Ever since it was installed, I think.

Q. And how many at a time?

A. Always six, I think.

Q. And is there any rule there or any regulation or custom as to how many shall ride up at a time?

Mr. FOX.—I object, if the Court please; I don't think it is material,—a rule or custom or a regula-

(Testimony of O. D. Chism.)

tion; that is very broad.

The COURT.—You had better ask one question at a time.

Q. Was there any rule there as to how many should go up? A. Never heard of any.

Q. Any orders?

A. No, sir, never heard of any.

Q. Any custom? A. Well, the custom was six.

Q. Always.

Mr. FOX.—I object. I submit we are not even bound by any such custom, and we are not even bound by directions in this case. [48]

The COURT.—Overruled.

Mr. FOX.—An exception.

Mr. MILLER.—That is all.

Recross-examination.

(By Mr. FOX.)

Q. Nobody was even directed to ride upon that when there were five already on that skip?

A. No, I can't say that they were.

Q. Nobody directed you gentlemen at that time to ride six upon that skip? A. No, sir.

Mr. FOX.—That is all.

Mr. MILLER.—I don't know whether I got your Honor's ruling as to whether that other objection was sustained or whether you had asked me to suspend. I would like to be heard upon the question of what the custom was there, in order to ask this witness another question.

The COURT.—I permitted you to ask as to what the custom was, that is, as to six riding.

(Testimony of O. D. Chism.)

Mr. MILLER.—And I also wanted to ask him what the practice had been there as to riding in the position which they did upon this occasion.

(Mr. Miller read from Knickerbocker Ice Co. vs. Finn, U. S. Circuit Courts, first American Negligence Cases, 742.)

(Continuing.) If we can show by this witness that for a long time in this mine it was the custom, or there was no rule to the contrary, that men had habitually, and, as the witness has said, were required, when six went up, one of them to occupy this other position—of course, [49] I don't think it is going to make much difference anyway,—but if that had been the custom for a long time, the company is presumed to know what is going on in its mine, and the jury are entitled to that evidence in determining the degree of care which this defendant should or should not have exercised there.

The COURT.—Now, what point are we getting at here? How does this question relate to your case here in chief? The question may arise if it be contended that the plaintiff was guilty of contributory negligence, or that by placing himself in a certain position he assumed the risk of danger. This is an affirmative defense.

Mr. FOX.—Yes, and it may also appear, of course, upon the plaintiff's case, and be taken advantage of for the purpose of a motion.

The COURT.—Well, if it does appear, yes, but you can't properly go into that on the plaintiff's case.

Mr. FOX.—No, not to rebut it.

(Testimony of O. D. Chism.)

Mr. MILLER.—Well, your Honor, it certainly does appear in the plaintiff's case when your Honor permits him to ask him whether, if he hadn't been upon the bail, he would have been hurt. If we haven't been permitted to go into it on our case then it leaves us in an embarrassing situation.

The COURT.—It doesn't appear that the bail was an improper place on which to ride, however.

Mr. FOX.—If your Honor please, I would like to be heard upon that proposition.

The COURT.—Well, my only question is as to whether or not it is proper to anticipate it. It may become **[50]** wholly immaterial. If you both concede that it bears only on the question of contributory negligence, I shall not permit you to go into it at present.

Mr. MILLER.—I concede that that is the only theory upon which I can possibly conceive that it would have any bearing upon the case.

The COURT.—I think I shall sustain the objection upon that ground, without intimating any view as to the merits of the question so far as it relates to contributory negligence.

Mr. MILLER.—That is all.

Q. Now, Mr. Chism, you say you were riding on the top? A. Yes, sir, on the left-hand side.

Q. And he was above you? A. Yes, sir.

Q. His feet were on the top bolster or cross-piece?

A. Well, they might have been on the top, and they might have been partly down, I couldn't say; I don't know how he was riding.

(Testimony of O. D. Chism.)

Q. Somebody else was sitting beside you?

A. Yes, sir.

Q. And it would have been necessary for him to have his feet on top of the cross-piece, wouldn't it? There would have been no other place where he could put his feet?

A. He could put his feet on our shoulders; they do that sometimes.

Q. Under your shoulders,—how do you mean?

A. They just partly ride on the bail; they sit on the bail, but they put their feet in the skip.

Q. And when they sit on the bail they lean on to the cable, don't they, and that is what this plaintiff did?

A. I don't know how he was riding; I couldn't tell you. **[51]**

Q. All you know is that you were sitting on the top bolster, and he was above you? A. Yes, sir.

Mr. FOX.—That is all.

[Testimony of Nick Petrinovich, for Plaintiff.]

NICK PETRINOVICH, duly sworn as a witness on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. State your name.

A. Nick Petrinovich.

Q. Do you remember—

Mr. MILLER.—I will make this as brief as I can, if counsel will indulge me.

Mr. FOX.—Certainly.

(Testimony of Nick Petrinovich.)

Q. What were you doing on the 17th day of May, 1912, the day that Hodge was hurt?

A. Well, the 17th day I have been mining in the place where I have been working, and the same morning we went up together on the skip.

Q. You went up on the skip with Mr. Hodge?

A. Yes.

Q. How many were there in that skip?

A. Six.

Q. And what happened at the top?

A. Well, the skip went right along past the place where we should get off, and bumped against the timber, the skip did.

Q. What happened to Mr. Hodge?

A. Well, he had pinched against the timber; I couldn't see; I was down on the bottom part of the skip.

Q. Do you know how long he was held there before they got him out? [52]

A. Oh, about eight or ten minutes before they sent him down.

Q. How long have you worked in that mine?

A. Oh, I have been working a good many years.

Q. How long have you ridden up that skip?

A. Well, ever since when they broke that raise through; I don't know how long.

Q. How many times do men go up and down that skip in a day?

A. They ride up in the morning, and evening down, at night-time.

Q. That is, every shift? A. Yes.

(Testimony of Nick Petrinovich.)

Q. Did you ever see the hoist that runs this skip?

A. Yes.

Q. Was there any indicator on it? A. No.

Q. Any bell system for signaling?

Mr. FOX.—I object, if your Honor please. It is shown that we had a sufficient system of signaling.

Mr. MILLER.—Who has shown it?

Mr. FOX.—It was shown upon the cross-examination that the signal worked perfectly on all occasions except this one occasion. Now the sufficiency of a system of signaling is a question of fact for the Court to determine, and not a question for the jury to determine. If your Honor is in doubt upon that point I will show you. It is a question of fact for the Court to determine, whether or not the system was sufficient there.

Mr. MILLER.—There isn't any evidence for the Court to pass on yet.

The COURT.—Overruled.

Mr. FOX.—An exception.

Q. Was there any bell system there? **[53]**

A. The only way, to pull the cord down to the station to stop the skip.

Q. That was the light?

A. The light, yes, flash.

Q. Did you see anybody try to stop it?

A. No, I couldn't see because I was on the bottom of the skip. I was looking down toward the bottom of the shaft.

Q. When the skip goes by a station, is it dark or light at the station?

(Testimony of Nick Petrinovich.)

A. Well, dark above the station, and one light there on the station.

Mr. MILLER.—You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. You were in the bottom? A. On the bottom.

Q. You weren't hurt? A. No.

Q. And you say that the plaintiff was riding on top of the skip, on the bail? A. Yes.

Q. Did you see him up there?

A. Well, I know when he was—before we started to go up.

Q. He climbed up on top of that, did he?

A. Well, he was sitting on the cross-piece on top, yes.

Q. He was sitting on the bail?

A. I don't know how he was sitting.

Q. He was above you?

A. Yes; a couple of men was above me; I was on the bottom.

Q. Did you see the way he was hurt? A. No.

[54]

Q. You didn't? A. No.

Q. If the plaintiff had been sitting where you were sitting, or in the skip, he wouldn't have been hurt, would he?

Mr. MILLER.—I object to it as an improper cross-examination.

A. I was first—

Mr. FOX.—Just a minute.

(Testimony of Nick Petrinovich.)

Mr. MILLER.—And it calls for a conclusion of the witness.

(Last question read.)

A. No.

The COURT.—I think I shall sustain the objection.

Mr. MILLER.—I move to strike out the answer.

The COURT.—Yes, it may be stricken out.

Mr. FOX.—I think that is all. **[55]**

[Testimony of Joseph Bruder, for Plaintiff.]

JOSEPH BRUDER, duly called and sworn as a witness on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. What is your name? A. Joseph Bruder.

Q. What were you doing on the 17th day of May, 1912, the day that Mr. Hodge was injured?

A. I was in the mine.

Q. Were you in the skip with him?

A. Yes, sir.

Q. How long has that skip been used for hoisting men there and timbers?

A. I don't know how long. I was moved up from the shaft to number four level a year ago last March.

Q. How long have you been riding up in that skip?

A. Ever since a year ago last March.

Q. How many men ride in it at a time?

A. Six, generally.

Q. How do they sit in the skip, or how are they located?

(Testimony of Joseph Bruder.)

A. There is three in the bottom.

Mr. FOX.—I must object to that; it certainly is not admissible, and it is not binding upon this defendant. It is obvious, if your Honor please, that this is a dangerous place. The Courts have held (citing cases and reading therefrom, followed by some discussion). There would be absolutely no liability whatever, if your Honor please, for the simple reason that it is obvious and plain that that is a dangerous place, and there is a proper place provided.

The COURT.—I shall sustain the objection at the [56] present time because it is anticipating a defense, but without any intimation that I shall ultimately hold that it isn't material, if you seek to relieve yourself of the responsibility upon the theory of contributory negligence. I will hear you at that time.

Mr. FOX.—That will be satisfactory.

Q. What happened when the skip got to the top?

A. Went up against the timber, against the cross-piece.

Q. How far was that above the usual place of stopping? A. About between six and eight feet.

Q. What happened to Mr. Hodge there?

A. That is where he got hurt.

Q. Did you notice how his leg was caught?

A. His leg was caught between the skip and the cross-timber.

Mr. MILLER.—You may cross-examine.

(Testimony of Joseph Bruder.)

Cross-examination.

(By Mr. FOX.)

Q. His leg was caught between the top of the skip and the cross-piece, was it? A. Yes, sir.

Q. You saw him caught there, did you?

A. Yes, sir.

Q. He had been sitting on the bail, hadn't he?

A. Yes.

Q. And if you sit and ride on the bail you have got to lean up over the cable in order to ride up, don't you?

A. You lean up against the cable, yes, sir.

Q. And that is the way he rode up there?

A. Yes, sir.

Mr. FOX.—That is all. [57]

[Testimony of Jack Edwards, for Plaintiff.]

JACK EDWARDS, duly called and sworn on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. What is your name? A. Jack Edwards.

Q. Where do you live?

A. Live at Wardner, Idaho.

Q. What is your business?

A. My business now is working in a livery-stable.

Q. What business were you engaged in on the 17th day of May, 1912, at the time Mr. Hodge was hurt?

A. I was working in the Last Chance on hoist.

Q. What hoist were you running?

A. I was working on the "D" hoist, and the "White."

(Testimony of Jack Edwards.)

Q. Do you know what hoist it was that operated the skip upon which Mr. Hodge was riding at the time he was hurt?

A. Yes, sir; it was the "White" hoist.

Q. Did you ever operate that hoist?

A. Yes, sir.

Q. Were you acquainted with it on that day?

A. I was not; I was off duty then.

Q. I mean were you acquainted with the hoist?

A. Yes, sir; I have run it.

Q. I wish you would briefly describe to the jury how these hoists run, and how the skips are operated.

Mr. FOX.—If the Court please, how this particular skip was operated—I have no objection to that.

Mr. MILLER.—Yes, that is the one.

The COURT.—Confine your answer to this particular skip or hoist. [58]

A. Well, I don't know what the degree is of the place, how steep it was, or anything about that, but it is run up with a cable, and over a sheave-wheel, and back down, and fastened to the skip with a bail, I should judge, probably—the bail probably is about two feet long, I guess, comes up to an arch, with a hole in it for the cable to come back into. It is fastened on with coupling bolts, pulled up and down from this cable over the sheave-wheel, and back to the drum.

Q. What is the drum?

A. The drum is the part of the engine that holds the cable; the cable winds up on it on the engine.

Q. What, if anything, was there on this hoist or

(Testimony of Jack Edwards.)

in connection with it, to indicate the position of the skip in the skipway?

A. I don't understand you—to keep it on the track, or to keep it from jumping off?

Q. No. What was there on the hoist, if anything, that would show the position of the skip in the skipway?

A. There was nothing that I know of except marks you would put on the cable yourself.

Q. You don't know whether there were any of those on this or not?

A. I do not, for I wasn't on it. I generally put marks on myself when I was running it.

Q. What is an indicator?

A. An indicator is a concern with a gauge on it that sets up over the hoist. Some indicators is put on different from others; it depends on what kind of an engine it is on.

Q. What is the purpose of an indicator?

A. An indicator is to show you where the levels are. [59]

Q. What is the purpose of that?

A. Well, so as in case of no accidents.

The COURT.—So what?

A. So as in case of no accidents; so that you ain't liable to run a man into a timber or up into the sheave-wheel.

Mr. FOX.—I object to that as a conclusion of the witness, and move that it be stricken out. The object evidently is to know where the skip is.

The COURT.—It may stand as it is.

(Testimony of Jack Edwards.)

Q. What system did they have of signaling there, do you know?

A. The system there at that time was flash-lights. What they have now I don't know.

Q. What is known as the bell system of signaling?

Mr. FOX.—If your Honor please, I would like to save the record, and object to that as immaterial. We have shown that there was sufficient signal to start and stop this hoist, if properly operated, and it is improper to show what system we might have had.

The COURT.—Well, that is true.

Mr. FOX.—Otherwise in these cases—

The COURT.—Just wait a minute. Objection sustained.

Q. How long have you operated hoists in mines similar to this?

A. Well, that is the first one I ever worked on. I worked in there I expect about pretty close to a year, I guess, not over that.

Q. In a case where, Mr. Edwards, such a hoist as this is operated with only the flash system that you have heard described, as a signal, what would you consider, what would you say as to whether or not that is an ordinarily safe appliance to use in the operation of a hoist such as this, where men are frequently traveling up and down the skip. [60]

Mr. FOX.—Just a moment. I object, if your Honor please; it certainly is incompetent for this witness to testify.

(Testimony of Jack Edwards.)

The COURT.—Just make your objection, Mr. Fox.

Mr. FOX.—I object on the ground that it is incompetent, irrelevant and immaterial, and that this witness has not qualified himself to answer.

The COURT.—Read the question, Mr. Reporter.

(Last question read.)

The COURT.—I doubt whether the witness has been sufficiently qualified, Mr. Miller. I think I shall sustain the objection on the ground of incompetency.

Mr. MILLER.—He has operated there for two years.

Mr. FOX.—One year, he says.

The COURT.—I understood him one year.

Mr. MILLER.—Well, he has operated these two different hoists.

The COURT.—I think you can go into the question of the dangers or defects of this system specifically, rather than calling for an expert opinion, unless he has made some study of what systems are being used, what systems are in vogue, for the purpose of enabling him to state whether or not that is an approved system, and of course there may be a number of approved systems. One company may use one system and another company another system.

Q. How many different hoists have you worked on?

A. These two are the only ones I ever worked on.

Q. For how long? A. For about a year.

Q. That is, you operated them continuously for a year? [61]

(Testimony of Jack Edwards.)

A. Yes, sir, only the times I would be laying off, probably a day or two at a time.

Q. Now, from your experience in operating are you able to say whether this was a reasonably safe appliance under the circumstances?

Mr. FOX.—The same objection, if the Court please.

The COURT.—Sustained.

Q. What, if any, danger is there in using the flash system of signal? A. I don't understand you.

The COURT.—You mean the flash system such as was used here?

Mr. MILLER.—Yes.

A. You mean?

Q. The kind they had there.

A. That was pulled by a cord?

Q. Yes.

A. Run by a little battery inside?

Q. What is the danger, if any, in using that system?

A. Well, there is sometimes that inside these batteries some of them will pull harder than others, and she will catch inside and won't flash no more; she will just stay there; but at that time it will put the lights out and hold them there until she sits down, until they are fixed.

Q. Is there any way, by that system, for the hoist man to know where the skip is in the skipway?

A. Well, you can't very well know unless he does get a flash where he is there, when he has got no marks to show.

(Testimony of Jack Edwards.)

Q. At what rate of speed do these skips pass these stations?

A. Well, I couldn't hardly say, with this one. There is a difference in hoists. Some of them runs faster than others. This [62] one was a small timber hoist; it would go a little bit faster than about as fast as you could run, I guess.

Q. Was there any bell signal on this hoist?

Mr. FOX.—We object as incompetent, irrelevant and immaterial.

Mr. MILLER.—I will withdraw the question.

Q. Was there any other signal or indicator other than the flash? A. No, sir.

Q. What is the advantage of having an indicator on the hoist?

A. Well, the advantage is—it is to tell you where you are at. This indicator travels with the drum, and tells you just exactly where you are at all the way up, till you get to the end of it.

Mr. MILLER.—You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. You say, Mr. Edwards, that if this system of signaling gets out of order the lights go out?

A. Yes, sir.

Q. And in that way you know if the lights are out for any length of time that it is out of order, and somebody is called to repair it? A. Yes, sir.

Q. Now, it is a fact that there was no regular hoistman upon this particular hoist and constantly present there all the time?

(Testimony of Jack Edwards.)

A. Only at the time when the shift was going up and down.

Q. And whenever they wanted to haul timber up and down, or *stell* up and down?

A. Well, sometimes we would and sometimes we wouldn't. [63]

Q. Then they would call a hoistman off the regular hoist and tell him to go over and hoist whatever was necessary? A. Yes, sir.

Q. It was a little emergency hoist they had there, wasn't it? A. Yes, sir.

Mr. FOX.—That is all.

Redirect Examination.

(By Mr. MILLER.)

Q. How many men were elevated up and down this skipway a day?

A. Well, sir, I couldn't hardly say.

Q. How many shifts were working?

A. There was two shifts; there was a night shift and a day shift.

Q. Do you know about how many men on a shift?

A. I should judge there would have been pretty close to a hundred, probably about forty-five; that is about it.

The COURT.—Forty-five to a shift?

A. Yes, sir.

Q. They all were taken up and down in this skipway? A. Yes, sir.

Mr. MILLER.—That is all.

(Testimony of Jack Edwards.)

Recross-examination.

(By Mr. FOX.)

Q. You don't know whether there were 45 men taken up and down every day in that skip, do you?

A. Well, sir, I couldn't say there was every day; there might have been some days there might have been more, and other days there might have been less.

Mr. FOX.—That is all.

Mr. MILLER.—That is all. [64]

[Testimony of Luster Urad Ashby, for Plaintiff.]

LUSTER URAD ASHBY, a witness duly called and sworn on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. State your name in full.

A. Luster Urad Ashby.

Q. Where do you live, Mr. Ashby?

A. Wardner, Idaho.

Q. What is your business?

A. My business now is a cager.

Q. Where were you,—what were you doing on the 17th of May, 1912? A. On the 17th of May?

Q. The day Mr. Hodge was hurt?

A. On the 17th of May—it was my usual custom the first thing in the morning—I hoisted the day shift in the "D" raise, and after I got the day shift up I tended skip and run the hoist alternately all the rest of the day.

Q. This particular skip? A. "D."

(Testimony of Luster Urad Ashby.)

Q. How many men, if you know, were hoisted a day in this skipway where Mr. Hodge was injured?

A. Well, it varied. I think the highest I remember of there being in one single shift was about 35, all the way from 20 to 35; it varied at different times.

Q. How many times had they to be taken up and down a day?

A. Just once each way, that is, once each shift each way.

Q. Two shifts?

A. Yes, sir, two shifts working underground, and three on the hoist. [65]

Q. How long have you been operating hoists?

A. I have worked on that hoist there about a month or two less than two years, and since then only a short time running another hoist in a different place.

Q. Have you worked in other mines in the Coeur d'Alenes? A. Yes, sir.

Q. And observed the hoists there? A. Yes, sir.

Q. What, if anything, was there upon this hoist to indicate to the hoistman or engineer the position of the hoist in the skipway? A. On the hoist?

Q. Yes. A. There was nothing.

Q. What system of signaling did they have?

A. They had two flash-lights, one at each station,—well, three, and one down at the bottom, on the bottom level.

Q. What danger or inconvenience is there in using a flash-light signal?

A. Well, to my mind there is considerable danger; in the first place, those flash-lights wouldn't work all

(Testimony of Luster Urad Ashby.)

the time, and that is—

Q. If they didn't work what would be the result?

A. You wouldn't know where the skip was and where they wanted the skip moved to, whether they wanted to come up or down.

Q. Would the hoistman, if it didn't work, have any means of knowing they were trying to signal him?

A. I have hoisted men there without any signals at all, without the flash-lights working.

The COURT.—That isn't the question.

Mr. FOX.—I move that the answer be stricken.

[66]

The COURT.—Yes, it may be stricken out.

Q. If the flash-light wouldn't work would the hoistman know whether the men in the skip were wanting to stop or not?

A. If the flash didn't work?

Q. Yes, would he know whether they wanted him to stop or go on, or what?

A. I don't hardly understand what you mean.

Q. I mean, if the men in the skip attempted to signal by this flash-light and it didn't work, would there be any way then that the hoistman would know where the skip was, or whether he was going by a station or not, or could tell where the stations were?

A. Well, he could look at the cable and tell almost where they were, tell almost near the station, just by the number of turns around the drum of the cable.

Q. What if the rope was not wrapped evenly?

A. Well, we couldn't tell where we were.

(Testimony of Luster Urad Ashby.)

Q. Then there was no way there that the hoistman could tell when they had reached or were passing a station except by this flash-light?

A. That is, if the cable didn't wrap evenly; that was the only way they had of knowing where the station was.

Q. And if the flash-light wouldn't work, he wouldn't know where he was?

A. Wouldn't know where he was.

Q. What is this indicator which they have?

A. It is a device composed of a chain that is wrapped around the shafting of the drum, and this chain is wrapped around another wheel, called the spricket wheel, set up on top of the hoist on a little frame, and this spricket wheel winds around a sort of a setscrew. Around this setscrew is a little indicator shaped almost like a finger, like that, [67] coming to a point, and as the drum revolves up or down this indicator goes along in front of the hoist, and at different intervals where the levels are, they are marked there, the number of the level, and you can tell just by that indicator where you are.

Q. Do you know what the usual appliances are in the mines of the Coeur d'Alenes for indicating to the hoistman the position of the hoist in the skip?

A. As far as I know, this indicator is the only one used.

Q. Is that generally used?

A. Yes, sir, so far as I know.

Q. What would you say as to whether or not a hoist such as this, with no system of signaling ex-

(Testimony of Luster Urad Ashby.)

cept the flash that you have described, would be reasonably safe to operate under the conditions under which this hoist was operated?

Mr. FOX.—The witness is not qualified. He has run these two little hoists in this particular mine, and he has caged in other mines; recently he has been a cager in a hoist, not a hoister.

Mr. MILLER.—He said he was acquainted with hoists in other mines.

The COURT.—He has stated what the systems are. The jury, I think, can draw a conclusion about as well as he can. He may describe the systems in vogue, how they operate, and how this one operates.

Q. What are the different systems?

A. Of operating hoists?

Q. Yes,—that is, for indicating.

A. Well, I have seen only two kinds of indicators out there; one is the kind I have just been telling you about, where the indicator moves on a straight line like that, in front of the hoist. [68] Then I have seen the other system, where it has a hand that goes around just like the hands of a clock, or a dial, and at different points on this dial levels are marked. Those two, and the one flash-light, those are the only three systems I have seen used.

Q. What?

A. The flash-light and that one by the dial and the indicator that runs along in a straight line, like that, these three are the only indicators I have seen used. I have seen them run just by marks on the cable.

Q. Where they have the indicator is it also neces-

(Testimony of Luster Urad Ashby.)
sary to have the signal? A. Yes, sir.

Q. That is, the hoist, in order to be properly equipped, must have also an indicator and a signal?

A. Yes, sir.

Q. What would you say as to whether a hoist was or was not properly equipped if it had a signal and no indicator?

Mr. FOX.—If the Court please, I think it depends entirely upon the character of the hoist. There are various characters of hoists, if the Court please, generally speaking.

The COURT.—Well, I think I shall let him answer this question.

Mr. FOX.—An exception.

The COURT.—Answer the question.

A. I beg your pardon; I didn't get the question.

Q. (Last question read.)

A. It was not properly equipped unless it had both signal and indicator on.

Mr. MILLER.—You may cross-examine. [69]

Cross-examination.

(By Mr. FOX.)

Q. You say you were there two years prior to this accident, is that it?

A. No, sir, not prior; I was there two years on that job altogether.

Q. Altogether? A. Yes, sir.

Q. This was a little bit of a skip and hoist, wasn't it?

A. Well, it was not a very large hoist or a very large skip.

(Testimony of Luster Urad Ashby.)

Q. Well, it was primarily intended, wasn't it, Mr. Ashby, for timber and steel and material; that is what that kind of a skip is intended for?

A. That is what it was built for, but that is not what it was used for.

Q. I am asking you what it was built for.

Mr. MILLER.—We don't care what it was intended for.

Mr. FOX.—We do care what it was intended for.

Q. That is what it was put in there for, isn't it?

Mr. MILLER.—I object as irrelevant, incompetent, and immaterial, if the Court please.

The COURT.—He may answer.

A. I don't think it was put there for that, because I never have hoisted timber there; I have hoisted very little timber there, and no steel.

Q. You say you have or you haven't.

A. I haven't.

Q. What else is it used for besides hauling the men up and down?

A. Practically nothing, unless when they are repairing the chute, they hoist the timber for the chute, and work off the [70] skip, take their timber from the skip, and that and hoisting the men is the only things I have known it to be used for.

Q. You say it was intended though, primarily, that character of hoist and skip is intended to haul material, and not men?

Mr. MILLER.—I object to that as calling for the witness' conclusion, who didn't have anything to do with the building of the hoist.

(Testimony of Luster Urad Ashby.)

Mr. FOX.—I think it is very material to show that it was originally intended for that, and these men got to using it.

The COURT.—I don't think the witness can answer what the company's intention was. I shall sustain the objection upon the ground, if you are asking what it was intended for by the company. If you ask what such a pattern or form of skip is designed for, what it is fitted for, you may ask him.

Q. What was such a character of skip designed or fitted for? A. For hoisting timber or men.

Q. Where are you working now?

A. Up in the Tyler Lease.

Q. You are caging up there, are you?

A. Yes, sir.

Q. That is the only place you have worked upon a skip or hoist except down in the Chance?

A. Yes, sir.

Q. What other mines have you worked in?

A. I have worked in the Bunker Hill; that is all, besides in the Last Chance and the Tyler Lease; those three.

Mr. FOX.—That is all.

Mr. MILLER.—That is all. [71]

[Testimony of Harry Martin, for Plaintiff.]

HARRY MARTIN, a witness duly called and sworn on behalf of plaintiff, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. What is your name? A. Harry Martin.

(Testimony of Harry Martin.)

Q. Where do you live? A. Wardner, Idaho.

Q. What is your business? A. Mining.

Q. What were you doing on the 17th day of May, 1912. A. Running hoist in the Last Chance.

Q. What hoist? A. The "White."

Q. Do you remember the occasion of Mr. Hodge's injury? A. I do.

Q. What were you doing at that time?

A. I was running the hoist.

Q. What time of day was he injured?

A. Just about half-past seven in the morning.

Q. Did you get any signal to stop the hoist just before his injury? A. I did not.

Q. Was there any indicator on your hoist?

A. There was not.

Q. What was the condition of the cable on this hoist? A. In very bad condition.

Q. What do you mean by that?

Mr. FOX.—I object, if your Honor please. It couldn't possibly be the cause of this injury.

The COURT.—Well, I can't tell whether it was or [72] not. They have alleged that it was the cause of the injury. Of course if they don't show that it was we will take it away from the jury.

Q. What did you mean by the cable being in bad condition? Just describe it.

A. Well, one way we had of telling, sometimes we put white spots on the cable with white lead.

Q. I didn't ask you about that.

The COURT.—That may be stricken out then.

Q. In what way was the cable in bad condition as

(Testimony of Harry Martin.)

to wear or tear?

A. Well, it was an old cable, had been on there for some time, and also it was all over mud, from the bottom of the skip.

Q. Did it wrap evenly on the drum?

A. It did not, not all the time.

Mr. MILLER.—You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. The cable held the skip, didn't it?

A. It sure did.

Q. And you ran the skip up into this sheave timber? A. I did.

Q. And it didn't break, did it? A. It did not.

Q. What do you know about cables anyhow, Mr. Martin?

Mr. MILLER.—I don't think that is proper. I object to it as not being proper cross-examination. If he wants to ask any particular question—

The COURT.—It is not quite a fair question to the witness. [73]

Mr. FOX.—All right, if your Honor please; I will withdraw it. I think that is all.

Mr. MILLER.—That's all.

[Testimony of C. H. Hodge on His Own Behalf.]

C. H. HODGE, duly called and sworn in his own behalf, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. State your name. A. C. H. Hodge.

Q. You are the plaintiff in this case?

(Testimony of C. H. Hodge.)

A. I am.

Q. How old are you, Mr. Hodge?

A. Twenty-four last February.

Q. What has been your business or occupation in life?

A. Mining. Well, prior to that I was a soldier four years, four months and nine days. I was signal maintainer on the C. & O. & T. P. Railroad July 15, 1910, to January 28, 1912; then I came to Wardner.

Q. When did you begin work for the Federal Mining Company? A. On the 1st day of April, 1912.

Q. What were you doing? A. Mucking.

Q. How long had you been working at that place in the vicinity of where this accident occurred, that is, where you had to go up this skipway?

A. From the 1st day of April to the 17th of May.

Q. What skipway did you use in going up?

A. The "White." **[74]**

Q. What shift were you working on?

A. I was working for Walker Johnson on day shift at the time the accident occurred.

Q. Who was Walker Johnson?

A. He was my shifter at the time.

Q. And was your shifter located there?

A. Yes, sir; he would come around about twice a day, around through the stope, morning and afternoon.

Q. Who was the foreman of the mine?

A. E. W. Peeples.

Q. Was he frequently around there?

(Testimony of C. H. Hodge.)

A. Well, we would see Mr. Peeples about once a week.

Q. What time did you go to work on this day you were injured? A. What time did I go to work?

Q. Yes.

A. About 7:30, I was supposed to go to work.

Q. How did you go to your place of work?

A. We went up on the skip from the White level, a distance of about 450 or 80 feet, more or less.

Q. How many of you were there in the skip?

A. Six.

Q. What, if anything, happened on the way up?

A. Sir?

Q. What, if anything, happened on the way up? What occurred? Did you get hurt, or anything?

A. They failed to get the flash, it seems, at the bottom.

Q. Well, just state what happened.

A. I got my leg broke.

Q. How? Just go ahead and tell about your getting into the skip, and where you were. [75]

A. I got in the skip at the White hoist, and hoist on up to number five, six of us on the skip. I was riding on the bail, two more men below me, and three below them; we stopped at the five hundred foot level and two men got off there, and then started up to number four, got there, and didn't slow down, and Mr. Chism flashed them, and we went into the sheave-wheel. They had a timber crossed right in front of the sheave-wheel, and I was lying in this position (indicating) on the skip,—had to, to hold

(Testimony of C. H. Hodge.)

on there. One man always rode on top. This is the shape I got in, something like this, on the skip, with my feet down this way so I could get a good brace. And the skip hit there and caught me on the back and shoulders. I turned myself to relieve myself, and this leg dropped down, and the skip just jammed right into it, just the same as it would jam into here.

Q. What was the usual place for the skip to stop there? A. Stop at the level.

Q. Always stopped there before?

A. Yes; sometimes got a little above or below it; it never went that far before.

Q. What happened to your leg?

A. The big bone in my leg was broke about here, starts here and runs around.

Q. How long were you laid up on account of it?

A. I was off five months before I done any work at all. I was in the hospital from the 17th day of May till the 24th day of July, and I went out of the hospital walking on crutches. Then I used a stick up till about the 10th day of October. Then I got *shut* of the stick and went to work the afternoon of the 16th of October. Then I worked from fifteen to twenty days a month. It was with difficulty that I done so. **[76]**

Q. When did you begin work regularly again?

A. I didn't work regularly until in February, the 3d day of February, 1913.

Q. Did you suffer any pain on account of the injury? A. Yes, I did.

Q. For how long?

(Testimony of C. H. Hodge.)

A. I suffer some yet, and sometimes my leg swells up now and pains. And sometimes I come home from work—it would swell up, and I could put on my dress-shoes, and I couldn't button it, and would have to leave it unbuttoned. I have had my digging-shoes when I come home swelled up till I couldn't pull it off; I would have to have a boy get hold of it and pull it off.

Q. How frequently did it pain you?

A. Right along while I was working.

Q. And it does yet? A. Yes, sir.

Q. How frequently does it swell?

A. Well, it generally swells around in rainy weather, and of course, working, you get wet more or less, and it swells on you.

Q. What wages are you getting to-day?

A. Three dollars.

Q. You are mucking? A. Yes, sir.

Q. Did you know that there wasn't any indicator on this hoist? A. I did not.

Mr. MILLER.—You may cross-examine.

Cross-examination.

(By Mr. FOX.)

Q. You went to work, you say, on the 16th of October, did you? [77]

A. The afternoon of the 16th of October, yes, sir.

Q. Well, that was the Tyler Lease, wasn't it?

A. Worked for Jaggo there in town, of the Tyler Lease, yes, sir.

Q. And you earned $3.50 a day from that time?

A. No, sir; $3.00 a day.

(Testimony of C. H. Hodge.)

Q. The same you had been earning at the time you were injured? A. Yes, sir.

Q. And you worked at the Tyler Lease there until practically the end of last year, didn't you?

A. Yes, I worked fifteen or twenty days a month, never got in over that.

Q. Fifteen or twenty days a month?

A. Yes, sir.

Q. And you don't mean to tell this jury that you were laid off on account of your leg, do you?

A. I do.

Q. Isn't it a fact that you claimed to have been laid up on account of having piles for a few days while working on the Tyler Lease?

A. I laid off for two days, yes, sir, sick.

Q. That is the only time you laid off to tell anybody about it? A. No, sir.

Q. Where have you been working just prior to coming here? A. For the Caledonia Company.

Q. When did you start to work for the Caledonia?

A. Started there on the morning of the 4th day of February, 1913.

Q. Just a few days after you quit the Tyler Lease last? [78]

A. I didn't quit the Tyler Lease last; I got fired.

Q. Just a few days after you quit or got fired?

A. Yes, sir; I got fired.

Q. I don't care whether you were fired or quit. And you have been working there practically ever since, up to the 10th of May? A. Yes, sir.

Q. And drawing $3.00 a day? A. Yes, sir.

(Testimony of C. H. Hodge.)

Q. And that mine just closed down and everybody quit? The work they were doing was shut down?

A. We was doing some of that lawsuit work. They had a lawsuit with the Bunker Hill, and we was doing the work there.

Q. But since that time you haven't been working?

A. No, sir.

Q. You were riding on top of this skip, were you?

A. I was.

Q. You sat right on the top cross-piece.

A. Yes, sir.

Q. Or bolster?

A. No bolster—cross-piece. The bolster is what goes inside. Some of them call it standards, and my feet was against the cross-piece.

Q. Now, take, for instance, this book as the skip. You were right on top there with your feet on top of it? A. Yes, I was.

Q. On top of the skip? A. Yes, sir.

Q. And you were lying on the bail of the cable?

A. I was.

Q. Holding on to the cable? **[79]**

A. Didn't hold on at all. The bail runs up about three feet, and it is a very good place to ride. If they had an indicator on it I would consider it as safe to ride there as any place else.

Mr. FOX.—I move that that be stricken out.

The COURT.—Yes, it may be stricken.

Q. How long did you say this bail was?

A. About three feet. It comes down something like this, to a kind of a peak.

(Testimony of C. H. Hodge.)

Q. The bail consists simply of an iron rod that is bent, doesn't it?

A. No, sir; it is a bent piece of iron about that weight, and that thick, five or six inches wide, about two inches thick.

Q. Five or six inches wide? A. Yes, sir.

Q. You say it is three feet long?

A. Yes, sir, comes kind of around in a circle.

Q. On this particular skip?

A. On the rest of them too, yes, sir.

Q. And that is where you were riding?

A. That is where I was riding.

Mr. FOX.—I think that is all.

Redirect Examination.

(By Mr. MILLER.)

Q. How many men went up and down this skip a day, do you know?

A. Well, sir, I should judge there was about 25 on number five level went up, and 20 or 25 on number four level, on each shift.

Q. They all had to be handled twice a day? **[80]**

A. Yes, sir; that is the only way I know of getting up there.

Q. Did you all go up that skip?

A. Four and five; we had orders to go that way, yes, sir.

Mr. MILLER.—That is all.

Recross-examination.

(By Mr. FOX.)

Q. Would you recognize a picture of this skip?

(Testimony of C. H. Hodge.)

A. Yes, sir, I would.

Q. If you should see one? A. Yes, sir.

Mr. FOX.—Mark this, please.

(Photograph marked Defendant's Exhibit No. 3.)

Q. I hand you now what is marked Defendant's Exhibit No. 3, for identification, and to be fair to you I will explain that I have marked the bottom—this is taken from the 400 level, you see, and looks right into the opening of the skip, you see?

A. Yes, sir.

Q. The skip is not entirely drawn up, because we couldn't get an entire picture of it, and that is the skip, is it?

A. I couldn't tell whether that is the skip or not. It has been fixed up. The skip we was riding on didn't have but one standard there; this one has four here. One or two is the most I ever saw on that skip.

Q. Well, they are just iron rods stuck in holes, aren't they? A. Yes, sir.

Q. Otherwise it is the same skip?

A. Yes, sir; only they have fixed it up.

Q. The only difference is that they have put these standards in, these rods? A. Yes, sir. [81]

Q. Otherwise the skip is the same?

A. Yes, sir.

Q. That is correct, is it? A. Yes.

Mr. FOX.—That is all.

Mr. MILLER.—That is all.

There is one discrepancy in the complaint. It alleges that the defendant is a corporation organized under the laws of the state of New Jersey. The an-

(Testimony of C. H. Hodge.)

swer says under the laws of Delaware.

Mr. FOX.—Well, we have alleged that it is Delaware, and we are bound by our answer in that respect.

Mr. MILLER.—With that understanding, we rest.

The COURT.—Gentlemen of the jury, you may be at ease for ten minutes.

(Jury retired from the courtroom.)

Mr. FOX.—If your Honor please, I would like to make a motion.

The COURT.—Very well.

Mr. FOX.—I would like to make a motion for nonsuit, if the Court please, upon the ground that there is no negligence shown which is the proximate cause of this injury or accident, upon the ground that if the accident occurred by reason of anyone's negligence it was by reason of the negligence of a fellow-servant, namely, the hoist man, and the other men in the skip who failed to give the signal, the negligence of either or both of them; and for the third reason that the plaintiff in this case was guilty of contributory negligence and assumed the risk, by placing himself in an obviously dangerous position, where a safe position had been open to him. [82]

(Authorities cited and read in support of motion.)

The proximate cause, if your Honor please, of this accident, was, first his own negligence, his own contributory negligence, and, second, the failure of this man down below here, Martin, to stop. He wasn't looking. The bell was pulled, even if it was only a short pull, and he was running the thing at exces-

(Testimony of C. H. Hodge.)

sive speed, for which we are not responsible. It was plainly the negligence of a fellow-servant, co-operating with the negligence of the plaintiff himself, and remotely, in the most remote degree, if your Honor please, our failure to have an indicator upon the skip. The direct and proximate cause of that injury was the fact that this man ran it at an excessive speed apparently, and failed to notice the signal which was given.

The COURT.—I think, gentlemen, as stated by Judge Shiras, each one of these cases must rest upon its own facts. In the view I take of this, I could not properly withdraw it from the jury. The motion is denied.

Mr. FOX.—May we have an exception, if your Honor please?

The COURT.—Yes.

(The jury thereupon returned into court.)

Whereupon,— [83]

[Testimony of M. T. Smith, for Defendant.]

M. T. SMITH, duly called and sworn on behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. Doctor, will you please state your full name.

A. M. T. Smith.

Q. Where do you reside? A. Wallace, Idaho.

Q. You are a physician and surgeon, are you not?

A. I am.

Q. And duly licensed to practice that profession

(Testimony of M. T. Smith.)

in the State of Idaho? A. I am.

Q. How long have you been in Wallace?

A. A little over three years.

Q. And are there conducting a hospital, are you not? A. I am.

Q. You are a graduate of a medical school, are you not, Doctor? A. Yes, sir.

Q. You know Dr. Kennett, don't you, who testified here this morning? A. Yes, sir.

Q. Please tell the jury what the fact is as to whether or not you took a number of X-ray photographs of the leg which was injured of the plaintiff.

A. I was present when these were taken; they were taken at my request by Dr. Kennett.

Q. You made an examination of the plaintiff's leg, did you? A. I did. [84]

Q. And you were present when those pictures were taken and developed? A. I was present, yes.

Q. I show you Defendant's Exhibit No. 1, for identification, and ask you to state if you recognize that as one of those pictures.

A. This is a print of one of the negatives which was taken at that time.

Mr. MILLER.—I understand the Courts have held that the negative—I will not make any objection.

Mr. FOX.—I prefer to introduce the photographs; they are so much more readily seen and understood.

Q. That is another of the pictures, is it?

A. Yes, sir.

Q. From what position was that taken?

(Testimony of M. T. Smith.)

A. Directly from the front, backwards.

Q. Does it show the position where the injury occurred, or the break occurred? A. Yes, it does.

Q. I show you Defendant's Exhibit No. 2, for identification, and ask you to state if that is one of the pictures which you took at that time of the plaintiff's leg.

A. This is a second view which was taken from the side.

Q. From the interior portion of the leg, was it?

A. Yes, sir.

Q. Where, if at all, was there a fracture in that leg?

A. There was a fracture about, I should say, four to six inches above the ankle joint.

Q. I will ask you, Doctor, from your examination of the plaintiff, whether you are able to state as to whether or not that fracture is thoroughly healed?

A. The fracture was what we call an oblique fracture, that is, [85] it was not straight through, but was on the bias, across the bone. The fracture is perfectly healed and the leg is solid.

Q. Doctor, I will ask you to state whether you have ever seen a better setting of a leg or a better result.

Mr. MILLER.—I object to it as immaterial.

The COURT.—Overruled.

A. No, I can't say that I have. The setting was as nearly perfect as could be.

Q. What was your opinion, Doctor, as to whether the plaintiff in this case should have perfect use of

(Testimony of M. T. Smith.)

his leg the same as before?

A. I can see no reason why he shouldn't have as perfect use as prior to the accident.

Mr. FOX.—That is all.

Cross-examination.

(By Mr. MILLER.)

Q. Doctor, supposing that at this time the leg frequently swells and pains him, especially after he has been working in the mine during the day and being on his feet, to what would you attribute that?

A. A swelling of the leg following a fracture is usual for some months following.

Q. And you would attribute that to this fracture?

A. Yes, in all probability.

Q. Are you able or not to say how long it will probably continue?

A. I would say, with a fracture which has as perfect an outcome as this, it would not continue very long, and it would not be usual for it to continue to the present.

Q. If it does continue to the present time what would you [86] say, whether you would attribute it to the fracture or not?

A. If it has swelled, from the time the cast was taken off, I should think it was.

Q. If it has continued to the present, what would you be able to say as to the future?

A. Only from the probabilities of the case, judging from the amount of injury which is apparent.

Q. You can't say whether it would be six months or two years longer?

(Testimony of M. T. Smith.)

A. I could not say any time.

Q. And it is a fact, isn't it, that a person becomes subject to rheumatism or something like that, or becomes slightly subject to it, it will attack him first in a fracture?

A. If this occurs within a short time after the accident, yes.

Mr. MILLER.—That is all.

Redirect Examination.

(By Mr. FOX.)

Q. Doctor, in your opinion then there would be no reason for there being swelling there at the present time?

A. There was no swelling at the time I made the examination, which was along in the afternoon; I can see no reason why there should be swelling.

Q. And can see no reason why there should be pain? A. I can see none.

Mr. FOX.—That is all.

Recross-examination.

(By Mr. MILLER.)

Q. But if there was, you would attribute it to the injury?

A. Pain is a subjective symptom that cannot be—

[87]

Q. It is subjective?

A. If that has been continuous from the time of the injury, I should say it probably was.

Mr. MILLER.—That is all.

(Testimony of M. T. Smith.)

Redirect Examination.

(By Mr. FOX.)

Q. There was no swelling at the time you examined the leg? A. No, sir.

Mr. FOX.—That is all.

Recross-examination.

(By Mr. MILLER.)

Q. We are speaking of when he was on his feet, Doctor, using it in the mine.

A. I couldn't say from my own knowledge. I haven't seen him following that.

Q. I say, admitting that it occurred when he was on his feet at the close of the day's work, would you attribute that to the injury?

A. There are numerous reasons why a leg should swell.

Q. I say, if at this late date it was swollen of an evening, after a day's work mucking, you would attribute that to the injury?

A. Yes, it probably would be.

Mr. MILLER.—That is all.

Mr. FOX.—That is all. [88]

[Testimony of Rush J. White, for Defendant.]

RUSH J. WHITE, a witness duly called and sworn on behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. Please state your full name.

A. Rush J. White.

Q. You are connected with the Federal Mining &

(Testimony of Rush J. White.)

Smelting Company, are you not? A. Yes, sir.

Q. Chief engineer for the company?

A. For one thing.

Q. And as such, in charge of all the engineering work for the Federal Mining & Smelting Company throughout this mine, are you not? A. Yes, sir.

Q. Are you familiar with what is known as the "White" hoist in the Last Chance mine at Wardner?

A. Yes.

Q. And have been familiar with it for how long?

A. Ever since it was projected.

Q. And it was put in under your supervision, was it? A. Yes, sir.

Q. Originally what was that hoist intended for?

Mr. MILLER.—I object to that as immaterial.

The COURT.—Overruled.

Mr. MILLER.—An exception.

A. The primary reason for driving the White raise was to transport ore from the upper levels.

Mr. MILLER.—I object to that as being immaterial.

The COURT.—The question is, what was this skip for? [89]

A. The skip and skipway were put in as incidental to the main use of the raise, and for convenience in the repair and construction of the raise.

Q. There is an old raise right alongside of it, and this skip and skipway was used incidental to that?

A. Yes, sir.

Q. You may explain to the jury what the fact was as to whether or not the men got to using that for

(Testimony of Rush J. White.)

their convenience:

A. Yes, the men used the skipway for going back and forth to their work, to and from their work.

Q. Now, I will show you what is marked Defendant's Exhibit No. 3, for identification, and ask you to state what that is.

A. It is a photographic print looking into the White raise from four level, and showing the upper portion of the skip, and the bail of the skip and the thimble and lower part of the cable where it fastened on to the skip.

Mr. MILLER.—I think I shall object to this unless this was a photograph of this particular skip.

Mr. FOX.—Well, I will prove that. You might presume that much.

Mr. MILLER.—Your Honor will remember that when it was presented to Mr. Hodge he said it was not the character of bail that was used when he was there.

Mr. FOX.—He did not say so, if the Court please.

Mr. MILLER.—He said this had two something on, while the other didn't.

Mr. FOX.—He said this had two standards on it.

The COURT.—There is a little too much discussion, gentlemen. I will rule on these objections. The objection is overruled.

Q. Just describe it, Mr. White. [90]

A. This shows the upper part of the skip, and it shows the cable going down, and also shows the signal cord, which is attached to the switch, controlling

(Testimony of Rush J. White.)
the flash-light. It also shows the earth and the curbing at the side of the raise as you look into it from the number four level.

Q. The angle at which that car stands, at which that car is shown there, shows the angle of the incline of the raise, does it not? A. Yes, sir.

Q. And the incline at which that car stands upon the rails in that raise?

A. Yes, sir. The bottom of the photograph is level. It was taken with the camera level.

Q. What is marked there "bottom" is bottom?

A. Yes, that is the bottom, and that would represent a horizontal line.

Q. Does that show the entire skip?

A. It shows the upper half.

Q. Why don't you show the other half?

A. The other half would be concealed by the lower limit of the opening into the skipway; the skip is so long that you can't show it all from the drift.

Q. It would be impossible to show in one picture.

A. Well, you couldn't show it anyway, not from this position you couldn't show it.

Q. I will ask you to state if you know whether or not that is the skip which was used at the time that the plaintiff was injured.

A. No, I don't know that this is the identical skip; those things are changed occasionally; I don't know that it is the identical skip. [91]

Q. Is it a similar skip?

A. It is a similar skip, yes.

Q. With reference to the bail?

(Testimony of Rush J. White.)

A. The bail is similar.

Q. Similar? A. Yes.

Q. In size?

A. It is similar in size and shape and function, and all that sort of thing; they are all built alike.

Q. They are all built alike?

A. Yes. I didn't say that I took the photograph.

Q. Well, I was going to ask you about those things. Now, when did you take that photograph, Mr. White?

A. I took it on the 22d of August, 1912.

Q. Last year? A. Yes, sir.

Q. The conditions surrounding the raise at that point were similar to the conditions as they existed at the time of the accident?

A. Yes; there has been no change.

Q. You show there a rope or string above the skip. What is that?

A. The straight one is the cable that hauls the skip up. The curved one is the signal cord attached to the switch, which operates the flash-light.

Q. Now, Mr. White, how long have you been following mining? A. About ten years.

Q. How long have you been chief engineer for the Federal Mining Company? A. Since 1907.

Q. Now, how many mines has the Federal Company up there in [92] operation, and has it had, during the time that you have been the chief engineer?

Mr. MILLER.—I object to that as immaterial.

The COURT.—Overruled.

(Testimony of Rush J. White.)

A. We have at the present time in operation three properties. We formerly had another one, which has since closed down, and at other times we have had in operation nonproducing properties, a number of them.

Q. You have become familiar with hoists in the Federal mines, have you not? A. Yes, sir.

Q. And the system by which they are operated?

A. Yes, sir.

Q. And have you seen hoists in the other mines around there? A. Yes, sir.

Q. The Hecla, and the Hercules, and the Snowstorm, and all those other mines?

A. All the operating mines in the Coeur d'Alenes I am familiar with.

Q. What would you say as to whether or not in the other mines hoists of this character are operated by means of light signals?

A. Timber hoists are always operated by means of signals, usually less efficient than this.

Q. What would you say, for the purpose for which this hoist was intended and used, whether or not this was a sufficient system of signals?

Mr. MILLER.—I object.

The COURT.—Yes, that is a rather double question.

Q. For the purposes for which this was used, what would you say as to whether or not it is a proper system of signals? [93]

The COURT.—Ask him the usual system.

(Testimony of Rush J. White.)

Q. Is that the usual system used in mines of that character?

A. Yes, this is usual; it is unusually good for a hoist of that particular character.

The COURT.—That isn't quite the question. The question is, if it is used for carrying men, is it the usual one. I understood your question to be that, and of course if you did not intend the question to go to that extent—

Mr. FOX.—I can make it go to that extent, if the Court please.

Q. If men are hoisted upon this particular kind of hoist, Mr. White, would that be the usual system that is employed there of signals?

A. Well, that is a little bit hard to answer directly, because conditions vary so much at different places, and it is difficult to answer that yes or no without qualification.

Q. Then answer it yes or no, and then qualify it the best you can.

A. Well, I will have to answer no, for the reason that ordinarily men are not handled in a place of this kind; it was merely in this case, as an accommodation to the men themselves.

Mr. MILLER.—I move to strike that answer, as not responsive.

Mr. FOX.—I think it is quite responsive, if the Court please.

The COURT.—Yes, I think that is a conclusion. It will be stricken out.

(Testimony of Rush J. White.)

Mr. FOX.—What portion of the answer, if the Court please? [94]

The COURT.—That part in which he states that they were permitted to use it, or did use it, as a matter of accommodation to them, that is, the workmen.

Q. How did they get to using this hoist? Just state the circumstances.

A. It was a few hundred feet closer to their place of work than the ordinary hoist by which men were hoisted previous to this time and since, and as a matter of accommodation to the men they were allowed to ride on that skip.

Q. You heard the testimony of the plaintiff, did you not, Mr. White? A. Yes, sir.

Q. Now, I will ask you what your opinion is as to whether or not this accident would have occurred if the plaintiff had ridden inside of the skip.

Mr. MILLER.—I object to that as calling for a conclusion of the witness, and irrelevant, incompetent and immaterial.

The COURT.—Sustained.

Mr. FOX.—An exception. That is all.

Cross-examination.

(By Mr. MILLER.)

Q. How long had the men been riding in this skip, Mr. White?

A. I don't remember the exact date when the White raise was first opened, but it was only a few months, a short time.

Q. That is, they began riding in it immediately after the White raise was opened?

(Testimony of Rush J. White.)

A. I presume so.

Q. And the men that rode in it were working for the company? A. Yes, sir. [95]

Q. And the skip was owned by the company?

A. Yes, sir.

Q. And the company furnished a hoist man to elevate them? A. Yes, sir.

Q. And have known ever since that they have been using it? A. Yes, sir.

Q. And you say that for a skip of this character, that carries the number of men that it does, that you wouldn't say that was a safe signal?

A. I didn't say that.

Q. What did you mean? You answered "no," didn't you?

A. I said that for a skip of this character it was a safe signal.

Q. Where men are hoisted?

A. It is a perfectly safe signal where men are hoisted; where a few men are hoisted it is a perfectly safe and adequate signal.

Q. What do you mean by a few?

A. Fifteen or twenty-five men, or thirty.

Q. Well, where they are raising say a hundred each way a day?

A. We don't do that in that kind of—

Q. I say, if they do. A. They don't.

Q. I say if they do, would you say it was safe?

A. I have never seen a case of that kind though.

Q. Now answer the question.

A. Yes, it would be, if operations were conducted

(Testimony of Rush J. White.)
slowly enough, and under the same conditions that they were conducted here.

Q. Why isn't it a safe signal?

A. It is a safe signal.

Q. You say for a few men. Why do you limit it?

[96]

A. I limit that as a matter of time, not as a matter of number.

Q. What did you mean?

A. I mean that if the time consumed in hoisting a skip-load of men is sufficient to allow proper operation of the hoist and of the signals the system is perfectly adequate.

Q. Well, what do you mean as to the way you operated it,—was it safe? A. Yes.

Q. They operate it there at about 300 feet a minute, don't they?

A. I don't know; if it was, it was too fast.

Q. It wouldn't be a safe signal at that rate of speed?

A. We wouldn't allow a hoist of that kind to be operated at that rate of speed.

Q. It wouldn't be a safe system at that rate of speed? A. No.

Q. At what rate of speed would it be safe?

A. At about 200 feet a minute it would be safe enough.

Q. For how many men? A. Five men on a skip.

Q. At what rate of speed would it be safe for six?

A. It wouldn't be—it is not proper for six men to ride on hoists of that kind.

(Testimony of Rush J. White.)

Q. You know they always did, don't you?

A. No, I don't.

Q. You never saw six? A. No.

Q. Never did? A. No, sir.

Q. And it has been operated since when? [97]

A. This particular hoist since I believe about a year ago the first of the year some time, about the first of the year, I would judge.

Q. The year 1912?

A. Yes, beginning of 1912; that is my recollection.

Q. Well, the safety of a signal system depends on the ability of the men riding in it and the man operating it to control it, does it not? A. Certainly.

Q. What would you say of a system like this, where you give the signal from above and they don't get it below?

A. If the signal were given above it would be received below.

Q. But if it were given above and wasn't received below, what would you say?

A. The signal couldn't possibly be given above without manifesting itself below.

Q. Now, answer the question. If it were given above and wasn't received below, what would you say as to the sufficiency of it?

A. That is an impossible condition, under the circumstances. When you break an electric circuit with lights in it the lights are bound to flash.

Q. In this case if they didn't—

A. I didn't see it; I don't know that it didn't.

Q. Well, but if this skip, when the signal was given

(Testimony of Rush J. White.)

above, didn't respond below, there would be something wrong with it? A. Oh, yes.

Q. And a system of that kind wouldn't be good, would it? A. I don't admit that the—

Q. I say a system of that kind wouldn't be good, would it? [98]

The COURT.—That is, assuming that the facts are as stated by counsel, Mr. White, that is, that the signal was given above and it was not received below.

A. That wouldn't be good.

The COURT.—Would that indicate some defect in it, or what?

A. Any defect in the signaling system would be manifested by the lights going out entirely, and there would be—it would be impossible to signal. If the circuit was broken that would be manifested by the lights going out and the whole system would be dead.

Q. Then if, in passing a station, the party who attempted to give the signal from above was unable to reach the cord in time, that might also cause a failure of signal? A. Yes, sir.

Q. An indicator on a hoist would show the position of the skip at every minute?

A. Not necessarily; an indicator is not an absolute control.

Q. But it is an assistance?

A. It is an assistance as an approximate location.

Q. Ordinarily, they use them in well-regulated mines for hoists, don't they?

A. Not for hoists of this character, no.

Q. Well, where men are raised?

(Testimony of Rush J. White.)

A. In general at an operating shaft indicators are used, yes; at an operating shaft or raise indicators are used.

Q. Is there any reason why they can't be used on any hoist that elevates men?

A. No; no reason in the world. [99]

Q. And that is an additional safeguard for the hoistman and the man in the skip? A. Yes, sir.

Mr. MILLER.—That is all.

Mr. FOX.—That is all.

[Testimony of Henry G. Bishop, for Defendant.]

HENRY G. BISHOP, duly called and sworn as a witness on behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. State your name. A. Henry G. Bishop.

Q. Where do you reside? A. Wardner, Idaho.

Q. What is your business or occupation ?

A. Shift boss for the Federal.

Q. How long have you been shift boss for the Federal?

A. For the biggest part of over nine years.

Q. That is at the Last Chance mine?

A. Yes, sir.

Q. The mine in which the plaintiff was hurt?

A. Yes, sir.

Q. Since the White raise has been put in there what kind of skips have they had in there?

A. They have a regular timber skip in there.

Q. Has there been a different character of skip in there of any kind?

(Testimony of Henry G. Bishop.)

A. Not to my knowledge; the timber skips are all made on the same pattern. [100]

Q. All the same? A. Yes, sir.

Mr. FOX.—That is all.

Mr. MILLER.—That is all.

[Testimony of Charles Sidney Parks, for Defendant.]

CHARLES SIDNEY PARKS, duly called and sworn as a witness in behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. State your full name.

A. Charles Sidney Parks.

Q. Where do you reside? A. Wardner, Idaho.

Q. What do you do? A. I have been mining.

Q. Do you know the plaintiff in this case, Mr. Hodge? A. Yes, sir.

Q. Did you go to work with him about in October at the Tyler Lease? A. Yes, sir.

Q. 1912, that would be? A. Yes, sir.

Q. How long did you work with him at the Tyler Lease? A. Three or four months.

Q. That is, until he left there and went over to the Caledonia? A. Yes, sir.

Q. During that time how often was he off, if you remember? A. Well, three or four times, I guess. [101]

Q. How long at a time would he be off?

A. Well, a day, I guess.

(Testimony of Charles Sidney Parks.)

Q. A day at a time?

A. One day he was off a day and a half.

Q. And the rest of the times he would be off a day, would he or not?

A. No, he wouldn't be off any more than a day, that I know of.

Q. What reason did he give for getting off?

A. He had the piles.

Mr. FOX.—That is all.

M. MILLER.—That is all.

[Testimony of Cecil James Walker, for Defendant.]

CECIL JAMES WALKER duly called and sworn as a witness in behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. FOX.)

Q. What is your name?

A. Cecil James Walker.

Q. Where do you reside? A. Wardner, Idaho.

Q. How long have you resided there?

A. About 14 months.

Q. And where were you employed in February and March and April and May, 1913?

A. In the Caledonia.

Q. As what? A. A miner.

Q. You were foreman there, were you not?

A. No, sir. [102]

Q. Were you in charge of a crew of men that drove the raise?

A. No; I couldn't say I was in charge of it; just taking the lead.

(Testimony of Cecil James Walker.)

Q. You were one of the men who did?

A. I took the lead of the raise in driving it.

Q. Do you know the plaintiff, Mr. Hodge?

A. Yes, sir.

Q. Was he there? A. He was.

Q. And do you remember about the time he came there? A. Started the same day I did.

Q. When was that? A. February 4th.

Q. And when did he leave?

A. We finished the night of May 10th.

Q. That is the day he left?

A. We finished that night on night shift.

Q. Was he off at any time during those days?

A. He laid off one day; then he was off five days on account of no timber, and I believe Hodge laid off six days that time; I was off five.

Q. Otherwise he was working there alongside of you, was he? A. Right along with me every day.

Q. What was he getting a day, if you know?

A. I believe it was $3.00.

Mr. FOX.—That is all.

Mr. MILLER.—No questions.

Mr. FOX.—I think that is all, if the Court please.

[103]

[Testimony of O. D. Chism, for Plaintiff (Recalled in Rebuttal).]

O. D. CHISM, heretofore duly sworn on behalf of plaintiff, upon being recalled in rebuttal, testified as follows, on

(Testimony of O. D. Chism.)

Direct Examination.

(By Mr. MILLER.)

Q. Mr. Chism, how many men during the time you were riding up and down that hoist would ride in the skip? A. Why—

Q. How many at a time?

A. How many at a time?

Q. Yes.

A. Why, six, when there was a sufficient number there to load the skip.

Q. When there was six or more to go up, did they ever take less than six?

A. Yes, I have rode up when there was only two or three, too.

Q. When there were six to go they would all go at once? A. Yes, sir.

Q. And one of them would ride on the bail?

A. Yes, sir.

Q. And that was the invariable rule?

Mr. FOX.—I object.

The COURT.—Overruled.

Mr. FOX.—An exception.

Q. That was the rule, that always one of them rode on the bail? A. Yes, sir.

Mr. MILLER.—That is all.

Cross-examination.

(By Mr. FOX.)

Q. That is a dangerous place to ride, isn't it, on the bail on the skip? **[104]**

Mr. MILLER.—I object to it as calling for the conclusion of the witness.

(Testimony of O. D. Chism.)

The COURT.—Overruled.

A. I don't know as I would be authority on giving—

Q. A man riding on the bail has got to ride partly on the cable and hold on to the cable, doesn't he?

A. Yes, I think so; I never rode on the bail myself.

Q. You wouldn't take that chance?

A. I never rode on the bail, no.

Q. How long have you been working there?

A. Three years.

Mr. FOX.—That is all.

Redirect Examination.

(By Mr. MILLER.)

Q. And the only way to get hurt there would be if the skip ran up into the bulkhead, on the bail?

Mr. FOX.—That is calling for a conclusion, if the Court please.

Mr. MILLER.—That is all. **[105]**

[Testimony of C. H. Hodge, in his Own Behalf (Recalled in Rebuttal).]

C. H. HODGE, heretofore duly sworn on behalf of plaintiff, upon being recalled in rebuttal, testified as follows, on

Direct Examination.

(By Mr. MILLER.)

Q. During the time they went up and down in this skip, how many men have always occupied the skip?

A. Six.

Mr. FOX.—I think that has been answered, and it is a question on the direct case, and not proper rebuttal.

(Testimony of C. H. Hodge.)

Q. Did you see other persons than yourself ride on the bail?

A. I did, yes, sir; it is customary for one man to ride on the bail.

Mr. MILLER.—That is all.

Mr. FOX.—I move that the answer be stricken out. I should have liked to have on the record my objection to that class of testimony, as to the custom there.

The COURT.—The objection is overruled, and you may have your exception. Do you desire to cross-examine him?

Mr. FOX.—No, I think not. That is all.

Mr. MILLER.—We rest.

Mr. FOX.—We rest.

The COURT.—The clerk advises me that no answer has ever been filed in the case.

Mr. FOX.—It must have been filed.

Mr. MILLER.—Mr. Morrison said he was unable to find one.

The COURT.—Does your record show the filing of the answer, Mr. Clerk?

The CLERK.—No, sir. **[106]**

Mr. FOX.—The answer was certainly prepared.

Mr. FEATHERSTONE.—If your Honor please, I sent the answer to Coeur d'Alene to Mr. Gray's office, and they notified me that they had served it on Mr. Morrison and filed it.

The COURT.—It may have been inadvertently overlooked.

Mr. FEATHERSTONE.—When I was here at the

first of the term the clerk informed me that the answer was filed in this case.

The CLERK.—I did?

Mr. FEATHERSTONE.—Yes, sir.

The CLERK.—I think you are mistaken.

Mr. MILLER.—They can substitute their copy; I don't care.

The COURT.—Perhaps you would better substitute a copy now. I haven't been able to see the answer yet.

The CLERK.—I told him the answer in the Warren case was filed.

Mr. FEATHERSTONE.—The answer in the Warren case wasn't here at that time.

The COURT.—The clerk usually charges for any filings, and apparently he hasn't charged for this; the presumption is against you, Mr. Featherstone.

Mr. FOX.—Here is a copy, if your Honor please, that may be filed.

The COURT.—It is not important, inasmuch as counsel consents that you may file a copy. This is a correct copy, is it?

Mr. FOX.—This is a correct copy.

The COURT.—About what date was it served? Have you anything to show when it was served? We will have it **[107]** filed as of that date.

Mr. MILLER.—April 30th.

The COURT.—Of this year?

Mr. MILLER.—Yes.

The COURT.—You may address the jury, gentlemen. If you have any requests you would better

hand them up now.

Mr. MILLER.—I have been working day and night on a case down at Spokane, and I didn't expect to reach this until to-morrow. I presume, however, that your Honor won't instruct the jury until after dinner?

The COURT.—Well, probably not.

(Argument by counsel.)

(Adjourned until 7:30 P. M.) **[108]**

[Instructions.]

7:30 P. M.

The COURT.—Gentlemen of the jury, as you understand, the plaintiff brings this action to recover damages from the defendant upon the theory and upon the assertion that the defendant was guilty of negligence in its maintenance of what is referred to in the evidence as a skip or skipway which was used by the employees of defendant in passing to and from the underground workings in defendant's mine. The first inquiry, therefore, is whether or not the claim in this respect is substantiated by the evidence. There are several issues upon which you are to find, provided you find that the defendant was guilty of negligence, but this is the first question to which you should give your attention: Was the defendant guilty in the maintenance of this skip in the condition in which you find from the evidence it was? As has been stated by counsel, negligence is usually defined as the doing of something which, under like circumstances, an ordinarily reasonable and prudent person would not do, or the leaving undone of something

which, under like circumstances, ordinarily prudent persons would do. It is conduct which differs from that of ordinarily reasonable and prudent persons under the existing circumstances. The particular claim, as I understand it, is that the negligence consisted in maintaining this skip and operating it without installing and using an indicator by which the man in charge of the engine or the hoist could determine from time to time as the skip was in motion just where it was. Apparently the indicator referred to is a means by which the engineer can read the progress of the car or skip either as it goes up or as it comes down. You have heard the evidence upon this question, and you are to say whether or not in the light of all of this evidence the defendant acted negligently in this respect. It appears from the evidence, or rather there is evidence tending to show, that this device or [109] instrumentality was installed originally or primarily as a carrier for freight, and not as a carrier for passengers. If it was only *of* carrier of freight, and if the plaintiff here and others used it wrongfully for the purpose of going into and coming out of the mine, then the defendant would not be liable for any injury which might have ensued unless it was through the wilful conduct of its employees, and there is no charge of wilfulness here; it is merely negligence. However, if you further find from the evidence that after this tram or car was installed the employees of the company working in that part of the mine found it convenient for their use in making their entrances into and their exits from the mine, and if they used the

car for this purpose with the knowledge and consent of the company, then you should find that the use was not wrongful, and the liability of the company would be substantially the same as if the car had been built for this purpose; that is, such use by the employees coupled with the consent of the employer would be equivalent to an express arrangement by which the employees were to be carried into the mine and out of the mine in this way. However, if you find that the company did thus, either expressly or impliedly, assent to such use, you should bear in mind that the evidence does not show, at least expressly show, the assent of the company to any particular manner or mode of use. Here, for instance, was an instrument which some of the witnesses state was intended primarily for the carriage of freight; it was not fitted up in such a way as to be of the best pattern or design for the carriage of passengers; at most it appears to have been crudely adapted or adaptable for that purpose. So that you have come to another consideration, of which I shall speak a little later, and that is, as to whether or not the evidence warrants you in finding that the company ever knew of or assented to the use of this car or skip in the manner in which the plaintiff was using it, the particular manner in which he was using it at the time of the accident; that is, whether the company ever knew of or assented **[110]** to any employee riding in the particular place where the plaintiff was when he was injured.

But before commenting upon that consideration, which involves also the questions of assumption of

risk and of contributory negligence, let me say that if you find that the defendant was negligent in the maintenance of this device without some additional means or provision for signaling, or for giving information touching the progress of the car, your next inquiry should be whether or not such negligence was the proximate cause of the accident. If you find that there was negligence, and that that negligence on the part of the defendant contributed to the accident, the next inquiry is as to whether or not the plaintiff himself was guilty of a want of ordinary care. A failure upon the part of the plaintiff to use ordinary care is called contributory negligence, and the general rule is that if the defendant is negligent, and that negligence contributes to the injury, and if the plaintiff is also negligent, and his negligence contributes to the injury, he cannot recover. So that it is important for you to consider carefully the conduct of the plaintiff himself at that time. The mere fact that others may have ridden in the same position which he occupied that day is not conclusive of the question of his negligence or want of negligence. We know that not infrequently men, in considerable numbers even, take hazards. Especially when they are working around dangerous machinery, or are handling dangerous instrumentalities, they become somewhat used to these things, and are willing to take risks that they should not take. And you should in consideration consider well the particular form of this skip or car, how it is attached to the cable, how it operates, its size, and the exact manner in which the plaintiff was located upon it at the time,

the manner in which he received the injury, and say whether or not a reasonable man,—I mean an ordinarily reasonable man, one of ordinary [111] prudence, would have taken the chances or taken the risk or occupied the position which he did upon that car. You should also take into consideration, as another circumstance, the fact that some others used it, and the testimony of one of the witnesses that while he had ridden upon this car, I think, for something like three years, he had never occupied this position. All of these facts and circumstances are to be considered by you in determining whether or not the plaintiff himself acted carelessly and negligently in occupying that position at the time of the accident.

Then there is a still further consideration, and it arises in this way: It is often stated to be the rule, and it is the rule, that it is a primary duty of the master, or employer, to provide a reasonably safe place for the employee to work, and also to provide him with reasonably safe appliances and tools, used in or in connection with his work. You will bear that in mind as being an obligation of the employer at all times, under all circumstances. He is to exercise reasonable care and prudence and intelligence in making this provision for the safety of his employees. That doesn't mean, of course, that an employer is an insurer. He may make mistakes; sometimes he may, as a reasonably prudent man, overlook a defect or err in his judgment; but he must exercise ordinary and reasonable care and prudence.

Now, then, upon the other hand, there is this other

principle, that if I go into your employ, and I am advised of the existence of certain defective conditions, or, if I am not expressly advised of those conditions, but know of their existence, or, through the exercise of my ordinary faculties, I could know of them, and if, in addition to that, I am, by reason of my intelligence and experience able to appreciate the possible danger from such conditions, then the rule is that I impliedly consent to work under those conditions, and I agree to assume whatever risk arises **[112]** out of them. I think I illustrated that, to some of you, at least, a few days ago: In the case of an ordinary axe, for instance, if you employ someone to chop wood, and the axe handle is cracked, but not entirely broken, and you call the man's attention to the fact that the axe handle is broken, and is likely to break in two, he must be careful, and if he is of sufficient age and intelligence to appreciate the possible danger, if he continues to use it under those conditions, he assumes the risk of any injury which may result. On the other hand, if he doesn't know of the existence of the defect, or if for any reason he should not be held to be able to appreciate the probable or possible danger from that defect, then he cannot be held to have agreed to assume the risk. He can't be held to assume that which he doesn't know of or doesn't appreciate. The principle, which I have illustrated in this homely way, is applicable to all of these personal cases. So here, if the mechanism of this instrumentality in all of its parts was open to the plaintiff, and if he knew about these conditions of which he now complains, and if, by reason of his

age and intelligence and experience, he was able to appreciate the danger, then he should be held to have agreed to assume any risk of danger to himself, and, of course, if you find that, knowing of such danger and appreciating it, he placed himself upon the car or skip in such a way as needlessly to subject himself to the danger, then he would be guilty of contributory negligence.

The burden is upon the party who asserts the existence of a fact to prove the fact by a preponderance of the evidence; so that in this case the burden was upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent in the respects referred to, and that that negligence contributed to the injury. Having done so, he makes a prima facie case. Upon **[113]** the other hand, the burden is upon the defendant to plead and prove assumption of risk, as I have defined it to you, and also to prove contributory negligence. The defendant here has alleged in its answer, which was not read to you, that the plaintiff assumed the risk, and also was guilty of contributory negligence, and the burden was upon it to establish these defenses by a preponderance of the evidence.

Exceptions.

Mr. FOX.—We desire to except to the refusal of the Court to grant our requested instruction which is in the words following: "You are instructed to find a verdict for the defendant in this case," for the reason that it appears from the evidence in this case adduced both on behalf of the plaintiff and on behalf of the defendant, that there was no actionable

negligence on the part of the defendant causing the injury complained of in plaintiff's complaint; that if the plaintiff was injured as claimed in his complaint, the injury was caused by his own want of care, and negligence, and that the evidence shows that he assumed the risks of the employment.

We object and except to the charge of the Court wherein the Court calls the attention of the jury to the fact that they may take *consideration any* custom which existed on the part of the employees of the defendant in riding upon the bail or cable of the skip in the manner in which the plaintiff rode upon the occasion and just prior to the accident which happened to him, for the reason that such custom, or the knowledge on the part of the plaintiff of such custom, does not exonerate the plaintiff from the charge of contributory negligence and assumption of risk. (Exceptions to instructions.)

I, Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, as the [114] Judge who presided in said court at the trial of the case of C. H. Hodge, plaintiff, vs. The Federal Mining & Smelting Company, defendant, tried in said court on the 11th day of June, A. D. 1913, and ending on the said day, do hereby certify that the foregoing Bill of Exceptions was handed me by the Clerk of the Court on the 16th day of September, A. D. 1913, for settlement, and it appearing to me that the same has been, within the time allowed by law and within the time allowed by an order of the Court extending such time, served upon the attorneys for the plaintiff together with no-

tice that the same would be presented for settlement, and the attorneys for the plaintiff having made no objection to the settlement and having offered no amendments thereto, and it appearing to me that the said Bill of Exceptions is correct and contains in substance all of the evidence offered at the trial of said cause, excluding exhibits which are separately certified, and the instructions given by the Court and all the exceptions taken by the defendant to the admission of testimony, and to the giving and refusal to give instructions to the jury, the said Bill of Exceptions is hereby signed, sealed, settled and allowed as and for a full, true and correct bill of exceptions in this case, and I hereby certify that the same with the exhibits separately certified but made a part hereof contains all of the evidence produced at the trial. The clerk is hereby directed to certify to the said exhibits as being a part of this Bill of Exceptions.

Dated at Boise, Idaho, this 17th day of September, A. D. 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Aug. 7, 1913. A. L. Richardson, Clerk. Refiled Sept. 18, 1913. A. L. Richardson, Clerk. [115]

In the District Court of the United States for the District of Idaho, Northern Division.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,

Defendant.

Order [Extending Time to August 26, 1913, to Present Bill of Exceptions].

Sufficient cause appearing therefor,—

It is hereby ORDERED that the defendant, Federal Mining & Smelting Company, have fifty days in addition to the time allowed by law and by the order of this Court, entered at the time of the trial herein, to wit, until the 26th day of August, A. D. 1913, within which to present for settlement its bill of exceptions to the errors occurring at the trial of the said cause heretofore filed herein.

Dated at Boise, Idaho, this 9th day of August, A. D. 1913.

FRANK S. DIETRICH,
District Judge.

Filed Aug. 9, 1913. A. L. Richardson, Clerk. By E. B. Yarington, Deputy. [116]

[Acceptance of Service of Bill of Exceptions.]

In the District Court of the United States for the District of Idaho, Northern Division.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY,

Defendant.

Service of the defendant's proposed Bill of Exceptions in the above-entitled action is hereby accepted and the receipt of a true and correct copy thereof admitted at Coeur d'Alene, Idaho, this 8th day of August, A. D. 1913.

ROBERTSON & MILLER,
W. F. MORRISON, Jr.,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 11, 1913. A. L. Richardson, Clerk. [117]

In the District Court of the United States for the District of Idaho, Northern Division.

Copy.

AT LAW.

C. H. HODGE,

Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

Comes now Federal Mining & Smelting Company, a Corporation, defendant herein, and says that on or about the 11th day of June, 1913, this Court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

FEATHERSTONE & FOX,
Attorneys for Defendant.
Residence and postoffice address—Wallace, Idaho.

[Endorsed]: Filed Aug. 26, 1913. A. L. Richardson, Clerk. [118]

In the District Court of the United States for the District of Idaho, Northern Division.

Copy.

C. H. HODGE,

Plaintiff,

vs.

THE FEDERAL MINING AND SMELTING COMPANY,

Defendant.

Assignments of Error.

I.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on direct examination, with reference to the custom existing as to the number of men who should ride upon the skip, to wit:

Q. Any custom?

for the reason that the defendant was not bound by any such custom, if the same existed, and was not bound even by a direction to the men that any particular number should ride upon the said skip. Which objection was overruled by the Court; to which ruling of the Court the defendant, then and there, by counsel duly excepted, which exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

II.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on direct examination as to the custom

existing among the miners, with reference to the number of men who rode upon the said skip, to wit:

Q. Always?

for the reason that the defendant was not bound in this case by any such custom and was not even bound by a direction to the men that any particular number should ride thereon. Which objection [119] was overruled by the Court; to which said ruling of the Court the defendant by counsel, then and there, duly excepted; which exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

III.

The Court erred in overruling the defendant's objection to the following question asked the witness, Nick Petrinovich, on direct examination, to wit:

Q. Any Bell system of signalling?

for the reason that it was not shown that the defendant had an insufficient system of signalling, but it was shown on cross-examination of witnesses that the signalling worked perfectly on all occasions except this one. The sufficiency of a system of signalling is a question of fact for the Court to determine and not a question for the jury to determine. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there, duly excepted; which exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

IV.

The Court erred in overruling the objection of the defendant to the following question asked the wit-

ness, Harry Martin, to wit:

Q. What was the condition of the cable on this hoist?

for the reason that the condition of the cable on this hoist could not possibly be the cause of this injury. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there duly excepted; which exception was allowed by the Court; which ruling of the Court the defendant now assigns as error.

V.

The Court erred in denying defendant's motion for a nonsuit made at the close of plaintiff's evidence in the case, because [120] the evidence adduced by the plaintiff was insufficient in the following particulars, to wit:

(a) The evidence did not show any negligence on the part of the defendant which was the approximate cause of the injuries sustained by the plaintiff.

(b) Upon the ground that, if the accident occurred by reason of anyone's negligence, it was by reason of the negligence of a fellow servant, namely, the hoistman, and the other men in the skip who failed to give the signal, or the negligence of both the men in the skip and the hoistman.

(c) The plaintiff by his own testimony has shown that he was guilty of contributory negligence and assumed the risk by placing himself in an obviously dangerous position, to wit, upon the bail and cable of the skip, whereas a safe position was open to him; which motion was denied by the Court; to which ruling of the Court the defendant by counsel, then and

there, duly excepted; which said exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

VI.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on the direct examination of the said witness in rebuttal, to wit:

Q. And one of them would ride on the bail?

for the reason that it was improper to show what the custom in this respect might be among the men of riding upon the bail. Which objection was overruled by the Court; to which said ruling of the Court the defendant by counsel, then and there, duly excepted; which said exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error. [121]

VII.

The Court erred in overruling defendant's objection to the following question asked the witness, O. D. Chism, on direct examination in rebuttal, relative to the rule which existed among the men that one of them would ride upon the bail, to wit:

Q. And that was the invariable rule?

for the reason that the defendant in this case was not bound by any rule or custom existing among the men of riding upon the bail. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there, excepted; which exception was allowed by the Court; which ruling of the Court the defendant now assigns as error.

VIII.

The Court erred in refusing to instruct the jury to return a verdict for the defendant in this case as requested by the defendant for the following reasons, to wit:

(a) It appears from all the evidence adduced in this case that there was no actionable negligence on the part of the defendant which was the proximate cause of the injury complained of in plaintiff's complaint.

(b) That, if the plaintiff was injured as complained of in his complaint, the injury was caused by his own want of care and his own negligence, and he assumed the risk of his employment; which said motion was denied by the Court; to which said ruling of the Court the defendant by counsel, then and there, excepted; which said exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

IX.

The Court erred in giving the following portion of his oral instruction to the jury, to wit:

"The failure upon the part of the plaintiff to use ordinary care is referred to as contributory negligence and the general [122] rule is that if the defendant is negligent and that negligence contributes to the injury, and if the plaintiff is also negligent and his negligence contributes to the injury, he cannot recover. So that it is important for you to consider carefully the conduct of the plaintiff at this time. The mere fact that others may have ridden in the same position that he occupied that day is not

conclusive of the question of his negligence or want of negligence. We know that not infrequently men in considerable numbers even, take hazards, especially when they are working around dangerous machinery, or are handling dangerous instruments; they become somewhat used to these things and take risks that they should not take. And you should consider well here the particular form of this skip or car,—how it was attached to the cable; how it operated, its size, and the exact manner in which the plaintiff was located upon it at the time, the manner in which he received the injury, and say whether or not a reasonable man—I mean an ordinarily reasonable man of ordinary prudence—would have taken the chances, or taken the risk, or occupied the position which he did, upon that car. You should, in addition to that, take into consideration as one circumstance, that some others used it, and the testimony here of one of the witnesses that while he had ridden upon that car, I think for something like three years, he stated that he had never occupied this position. All of these facts and circumstances are to be considered by you in determining whether or not the plaintiff himself acted carelessly and negligently in taking that position at the time of the accident."

To which portion of the said oral charge of the Court to the jury, and specifically that portion wherein the Court called the attention of the jury to the fact that they might take into consideration any custom which had existed on the part of the employees of the defendant in riding in the position in which the [123] plaintiff was riding upon the said

skip at the time of the said injury, to wit, upon the bail or the cable of the said skip, the defendant by counsel, then and there, duly objected and excepted for the reason that such custom did not exonerate the plaintiff from his contributory negligence, and assumption of risk by him; which said exception was duly allowed by the Court; and which said action of the Court in giving the said portion of the said instruction, the defendant now assigns as error.

SPECIFICATIONS WHEREIN THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY AND JUDGMENT THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to wit:

(a) There is no evidence of any negligence on the part of the defendant which was the approximate cause of the injury to the plaintiff. While the evidence discloses that this particular hoist did not have any indicator upon it, at the same time it appears that the equipment of the hoist and the signalling system had always been, and was then, sufficient for the purpose for which it was used, had proper use thereof been made by the fellow-employees of the plaintiff. The evidence further discloses that the approximate cause of plaintiff's injuries was the fact that he was sitting and riding upon the bail and cable of the skip and that he would not have been injured in this accident but for the fact that he assumed an obviously dangerous position in which to ride

Order Allowing Writ of Error.

This 18th day of September, 1913, came the defendant by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of Three Thousand Dollars, which shall operate as a supersedeas bond.

Dated this 18th day of September, 1913.

FRANK S. DIETRICH,
Judge of the United States District Court for the District of Idaho.

[Endorsed]: Filed Sept. 18, 1913. A. L. Richardson, Clerk. [127]

In the District Court of the United States for the District of Idaho, Northern Division.

Copy.

C. H. HODGE,
Plaintiff,

vs.

THE FEDERAL MINING & SMELTING COMPANY,
Defendant.

Order to Transmit Original Exhibits.

It appearing that a writ of error has been prayed for and allowed from the United States Circuit Court of Appeals to the above-entitled court in this cause, and good cause appearing therefor, it is hereby ORDERED that all of the original exhibits in the above-entitled cause be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit. Said Exhibits consisting of 4 glass X-ray plates and 3 photographs.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed Sept. 28, 1913. A. L. Richardson, Clerk. [128]

THE AETNA ACCIDENT AND LIABILITY COMPANY.
HARTFORD, CONNECTICUT.
MORGAN G. BULKELEY, PRESIDENT.

In the District Court of the United States for the District of Idaho, Northern Division.

C. H. HODGE,
Plaintiff,

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, FEDERAL MINING & SMELTING

COMPANY, a corporation, as principal, and THE AETNA ACCIDENT AND LIABILITY COMPANY, a corporation, organized and existing under and by virtue of the laws of Connecticut, having complied with all the statutes of the United States, authorizing it to become a surety on bonds in the courts of the United States, as surety, are held and firmly bound unto the defendant in error, C. H. Hodge, in the full and just sum of Three Thousand Dollars ($3,000.00) to be paid to the said defendant in error, C. H. Hodge, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be paid, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents;

Sealed with our seals and dated this 5th day of August, A. D. 1913.

WHEREAS, lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between C. H. Hodge as plaintiff [129] and Federal Mining & Smelting Company, a corporation, as defendant, a judgment was rendered against the said Federal Mining & Smelting Company, upon the verdict of a jury, in the sum of One Thousand Dollars ($1,000.00), and costs amounting to the further sum of $166.80;

AND WHEREAS, the said defendant, Federal Mining & Smelting Company, considering it is aggrieved thereby, has obtained from the said Court a writ of error to reverse and correct said judgment in that behalf, and a citation directed to the said

plaintiff, C. H. Hodge, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California.

NOW, the condition of the above obligation is such that, if the said Federal Mining & Smelting Company shall prosecute the said writ of error to effect and answer all damages and costs if it fails to make the said plea good in said court, then the above obligation to be void, otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and is a supersedeas bond.

FEDERAL MINING & SMELTING COMPANY,

By WM. J. HALL,

Its Assistant General Manager and Agent, Principal.

THE AETNA ACCIDENT & LIABILITY COMPANY,

[Seal] By HERMAN J. ROSSI,

Resident Vice-President.

Attest: THERRETT TOWLES,

Resident Assistant Secretary.

The foregoing bond is hereby approved this 18th day of August, A. D. 1913, and the same when filed shall operate both as a bond for costs on appeal and as a supersedeas bond.

FRANK S. DIETRICH,

Judge. [130]

THE AETNA ACCIDENT AND LIABILITY COMPANY.

HARTFORD, CONNECTICUT.

CERTIFICATE OF AUTHORITY OF RESIDENT VICE-PRESIDENT.

KNOW ALL MEN BY THESE PRESENTS, That Herman J. Rossi has been and is hereby appointed Resident Vice-President of The Aetna Accident and Liability Company, of Hartford, Connecticut, at Wallace, Idaho, and as such Resident Vice-President has full power and authority to sign and execute, on behalf of The Aetna Accident and Liability Company, any and all bonds and undertakings, and all bonds and undertakings signed by him, when sealed and attested by a Resident Assistant Secretary, shall be as valid and binding upon the Company as if said bonds and undertakings had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Aetna Accident and Liability Company at a meeting duly called and held on the 28th day of December, 1911.

ARTICLE 8. RESIDENT OFFICERS, ATTORNEYS–IN–FACT AND AGENTS.

Section 1. The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary of the Board of Directors may at any time

remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-fact or Agent and revoke the power and authority given him.

Section 2. Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary. [131]

IN WITNESS WHEREOF, The Aetna Accident and Liability Company has caused these presents to be signed by its Secretary and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 21st day of April, A. D. 1913.

THE AETNA ACCIDENT AND LIABILITY COMPANY.

[Seal] By J. S. ROWE,
Secretary.

Attest: C. W. MEYERS,
Assistant Secretary.

State of Connecticut,
County of Hartford,—ss.

On this 21st day of April, A. D. 1913, before me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say: that he resides in the city of Hartford, State of Connecticut;

that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal] JAMES F. McEVITT,
Notary Public.

My Commission expires Jan. 31, 1914. **[132]**

THE AETNA ACCIDENT AND LIABILITY COMPANY, HARTFORD, CONNECTICUT.

CERTIFICATE OF AUTHORITY OF RESIDENT ASSISTANT SECRETARY.

KNOW ALL MEN BY THESE PRESENTS, That Therrett Towles has been and is hereby appointed Resident Assistant Secretary of The Aetna Accident and Liability Company, of Hartford Connecticut, at Wallace, Idaho, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Law adopted by the Board of Directors of The Aetna Accident and Liability Com-

pany, at a meeting duly called and held on the 28th day of December, 1911.

ARTICLE 8. RESIDENT OFFICERS, ATTORNEYS–IN–FACT AND AGENTS. Section 1. The president, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-fact or Agent and revoke the power and authority given him. Section 3. Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President. **[133]**

IN WITNESS WHEREOF, THE AETNA ACCIDENT AND LIABILITY COMPANY has caused these presents to be signed by its Secretary and its corporate seal to be hereto affixed, duly attested by

its Assistant Secretary, this 21st day of April, A. D. 1913.

THE AETNA ACCIDENT AND LIABILITY COMPANY.

[Seal] By J. S. ROWE,
Secretary.

Attest: C. W. MEYERS,
Assistant Secretary.

State of Connecticut,
County of Hartford,—ss.

On this 21st day of April, A. D. 1913, before me personally came J. S. Rowe, to me known, who, being by me duly sworn, did depose and say; that he resides in the city of Hartford, State of Connecticut, that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Seal] JAMES F. McEVITT,
Notary Public.

My Commission expires Jan. 31, 1914.

[Endorsed]: Filed Sept. 18, 1913. A. L. Richardson, Clerk. **[134]**

In the District Court of the United States for the District of Idaho, Northern Division.

Copy.

C. H. HODGE,

Plaintiff,

vs.

THE FEDERAL MINING AND SMELTING COMPANY,

Defendants.

Praecipe for Transcript.

To A. L. Richardson, Clerk of the United States District Court, Boise, Idaho:

Dear Sir: You will please prepare a transcript in the above-entitled cause and will include therein:

1. Writ of Error and Citation, Appeal Bond, Assignments of Error, and all other papers relating to the appeal.
2. Judgment-roll.
3. Bill of Exceptions.
4. Copy of Journal Entries.
5. Everything else in the Record.

FEATHERSTONE & FOX,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 26, 1913. A. L. Richardson, Clerk. **[135]**

[Writ of Error (Original).]

The United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.
The President of the United States, to the Honorable Judge of the District Court of the United States, for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between C. H. Hodge, plaintiff, and Federal Mining & Smelting Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Federal Mining & Smelting Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit on the 18th day of October next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right,

and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 18th day of September, A. D. 1913, and in the **[136]** one hundred thirty-seventh year of the Independence of the United States of America.

Allowed by

FRANK S. DIETRICH,
United States District Judge.

[Seal] Attest: A. L. RICHARDSON,
Clerk of the District Court of the United States, District of Idaho. **[137]**

[Endorsed]: No. 554. The United States Circuit Court of Appeals for the Ninth Circuit. C. H. Hodge, Plaintiff, vs. Federal Mining & Smelting Company, a Corporation, Defendant. Writ of Error. Filed Sept. 18, 1913. A. L. Richardson, Clerk. **[138]**

[Citation on Writ of Error (Original).]

The United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.

To C. H. Hodge, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, on the 18th day of October next, pursuant to a writ of

error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Federal Mining & Smelting Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH, District Judge of the United States, at Boise, Idaho, within said Circuit, this 18th day of September, in the year of our Lord one thousand nine hundred thirteen, and of the Independence of the United States of America the one hundred and thirty-seventh.

FRANK S. DIETRICH,
United States District Judge.

I hereby, this 29th day of September, 1913, accept personal service of this citation on behalf of C. H. Hodge, Appellee.

ROBERTSON & MILLER,
W. F. MORRISON, Jr.,
Attorneys for Appellee. **[139]**

[Endorsed]: No. 554. The United States Circuit Court of Appeals for the Ninth Circuit. C. H. Hodge, Plaintiff, vs. Federal Mining & Smelting Company, a Corporation, Defendant. Citation. Filed on return, Oct. 2d. 1913. A. L. Richardson, Clerk. **[140]**

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. **[141]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Idaho, Northern Division.

C. H. HODGE,

Plaintiff,

vs.

THE FEDERAL MINING AND SMELTING COMPANY,

Defendant.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 142, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, excepting the original exhibits which are separately certified and transmitted herewith, which together constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the cost of the record herein amounts to the sum of $89.60, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of the said District Court, this 2d day of October, 1913.

[Seal] A. L. RICHARDSON,
Clerk. **[142]**

[Endorsed]: No. 2325. United States Circuit Court of Appeals for the Ninth Circuit. The Federal Mining & Smelting Company, a Corporation, Plaintiff in Error, vs. C. H. Hodge, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Received October 15, 1913.

F. D. MONCKTON,
Clerk.

Filed October 15, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.